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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

DAISY E. BICKEL, DOROTHY JONES, RICHARD A. BOWDEN, WILLIE N. JAMES and MICHAEL D. JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

While these appeals were pending in the court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), and held that (a) the types of recoverable compensatory damages in an action to which the Warsaw Convention applies must be determined by reference to domestic law and (b) the applicable domestic law in that case, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, allows for the recovery of pecuniary damages only.

The appeals in the court below arise out of the same event as involved in *Zicherman*. The court below, after directing the parties, at the request of Petitioner KOREAN AIR LINES CO., LTD. ("KAL"), to address the effect of *Zicherman* on the pending appeals, first held that *Zicherman* presented an "insuperable obstacle" to the award of nonpecuniary pre-death pain and suffering damages. On rehearing, however, the court (2-1) reversed itself and declined to decide whether *Zicherman* precludes an award of nonpecuniary pre-death pain and suffering damages under the Warsaw Convention or DOHSA.

The questions presented for review are:

1. Whether the court below was required to apply, to pending but undecided appeals, the intervening decision of the Court in *Zicherman*, so as to preclude an award of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention alone?

2. Whether, in light of *Zicherman*, the pecuniary damages allowed by DOHSA may be supplemented with nonpecuniary damages for pre-death pain and suffering on the basis of the Warsaw Convention, general maritime law or state law?

These questions also are presented for review in the Petition for a Writ of Certiorari filed by Petitioner KAL in

Korean Air Lines v. Forman, No. 96-530 (U.S., docketed Oct. 4, 1996) and, in an inverse context, in the Petition filed by the plaintiffs in *Saavedra v. Korean Air Lines*, No. 96-623 (U.S., docketed Oct. 18, 1996).

LIST OF ALL PARTIES AND RULE 29.6 LISTING

A. Petitioner

The Petitioner is KOREAN AIR LINES CO., LTD. ("KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

B. Respondents

The Respondents are (1) Daisy E. Bickel, the personal representative of the estate of Edna Miller, (2) Dorothy Jones, the personal representative of the estate of Joyce Chambers, (3) Richard A. Bowden, the personal representative of the estate of Eleanor Bissell, (4) Willie N. James, the personal representative of the estate of Hazel James, and (5) Michael D. Jones, the personal representative of the estate of Margaret Zarif. Respondents were the plaintiffs-appellees/cross-appellants in the Court of Appeals below.

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DAISY E. BICKEL, DOROTHY JONES, RICHARD A. BOWDEN, WILLIE N. JAMES and MICHAEL D. JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner KOREAN AIR LINES CO., LTD. ("KAL") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on August 29, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals on rehearing is officially reported at 96 F.3d 151 (6th Cir. 1996). The first opinion of the Court of Appeals is officially reported at 83 F.3d

127 (6th Cir. 1996). Both opinions are reproduced in the Appendix to the Petition at A 1a-17a and A 18a-28a.[1] The opinion of the district court is officially reported in *Bowden v. Korean Air Lines*, 814 F. Supp. 592 (E.D. Mich. 1993), and is reproduced in the Appendix to the Petition at A 35a-46a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1996. A 2a. KAL's timely petition for rehearing and suggestion for rehearing *en banc* was denied by Order dated October 10, 1996. A 29a-30a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

These actions are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth at A 47a-48a.

STATEMENT OF THE CASE

A. Nature of the Case

Decedents Edna Miller, Joyce Chambers, Eleanor Bissell, Hazel James and Margaret Zarif were passengers on KAL flight KE007 who were killed when the aircraft was shot down by Soviet military aircraft on September 1, 1983. The deaths of the decedents occurred on the high seas within the

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[1] References preceded by "A" refer to pages in the Appendix to the Petition.

meaning of DOHSA, during the course of international transportation by air, within the meaning of the Warsaw Convention.[2] The Respondents are the personal representatives of the estates of the deceased passengers, who seek pecuniary and nonpecuniary damages individually and on behalf of the estates and various surviving relatives of the decedents.

B. Disposition Below

1. The Rulings of the District Court

Prior to trial on the issues of damages, KAL moved for a determination that DOHSA applies to the damage claims and prohibits the recovery of any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering of the deceased passengers. The district court[3] denied KAL's motion and held that DOHSA does not apply to bar the recovery of nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. The district court ruled that such nonpecuniary damages were recoverable *directly* under Article 17 of the Warsaw Convention, which makes the carrier liable for "damage sustained in the event of the death or wounding of a passenger." *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993) ("*Bowden*") (A 41a-44a).

Following separate damage trials, Respondents were awarded, *inter alia*, nonpecuniary damages for the decedents' pre-death pain and suffering in the following amounts: (a) decedent Edna Miller: $100,000; (b) decedent Joyce Chambers: $400,000; (c) decedent Eleanor Bissell: $1,350,000;

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[2] The jurisdiction of the district court was based on federal question (28 U.S.C. § 1331), diversity of citizenship (28 U.S.C. § 1332) and original admiralty and maritime jurisdiction (28 U.S.C. § 1333).

[3] These cases were consolidated in the district court. The district court issued pretrial rulings applicable to all five of the cases and presided over the damages trial in each of the cases.

(d) decedent Hazel James: $30,000; and (e) decedent Margaret Zarif: $1,000,000[4].

The district court in each case denied KAL's post-trial motions to set aside all nonpecuniary damage awards.

2. The Appeals and the Intervening Supreme Court Decision in *Zicherman v. Korean Air Lines*

KAL appealed the judgments, including the pre-trial and post-trial decisions of the district court.[5] In its initial appellate briefs, KAL argued that nonpecuniary damages for loss of society and survivor's grief were not recoverable under DOHSA and that the awards for nonpecuniary pre-death pain and suffering damages were not supported by sufficient evidence. KAL did not argue in its initial briefs the antecedent question of whether nonpecuniary pre-death pain and suffering damages were recoverable as a matter of law because, unlike loss of society damages, *all* pre-*Zicherman* decisions had allowed the recovery of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention[6], general maritime law and/or state law.[7] Such was the state of the law, absent a definitive ruling from the Court.

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[4] Each case was tried to a jury, except *Zarif*, which was tried nonjury by the district court.

[5] The cases were consolidated on appeal. *See* Order (6th Cir. Mar. 3, 1994) (A 33a-34a).

[6] *See, e.g., Saavedra v. Korean Air Lines*, Nos. 84-9324 *et seq.* (C.D. Cal. July 16, 1993), *rev'd in relevant part*, 93 F.3d 547 (9th Cir. 1996); *In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993); *In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1264 (N.D. Cal. 1992) ("*Hawaii II*").

[7] *See, e.g., Preston v. Frantz*, 11 F.3d 357, 358 (2d Cir. 1993); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974); *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386, 1389 (3d Cir. 1971); *Gray*

Respondents argued that the recoverable damages are defined by the Warsaw Convention, federal common law and/or general maritime law, which Respondents asserted allow for the recovery of all nonpecuniary damages awarded in the district court.

On January 31, 1995, the Court of Appeals entertained oral argument of the appeals. On April 17, 1995, the Supreme Court granted *certiorari* in *Zicherman* and on June 23, 1995, the court below advised the parties that, unless there were any objections, the decision on the appeals would be held in abeyance pending the ultimate decision of the Supreme Court in *Zicherman*. None of the parties objected.

On January 16, 1996, while the appeals were pending in the court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). The Court in *Zicherman* rejected the notion that any type of damage is recoverable directly under Article 17 of the Warsaw Convention as "damage sustained." *Zicherman*, 116 S. Ct. at 632-36. The Court explained that "damage sustained" in Article 17 refers to "legally cognizable harm" and that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 635-36.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—

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v. Lockheed, 880 F. Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. U.S. Steel Min. Co., Inc.*, 856 F. Supp. 274, 280 (E.D. Va. 1994); *McAleer v. Smith*, 791 F. Supp. 923, 927 (D.R.I. 1992).

that will supersede the normal federal disposition" absent the Convention. *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.* Since DOHSA applies to deaths on the high seas and permits recovery of pecuniary damages only, the Court ruled that nonpecuniary damages for loss of society (the only specific damage award involved in *Zicherman*) were unavailable. *Id.* at 636-37; 46 U.S.C. App. § 762 (A 48a). The Court specifically noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," as the question was not before the Court. *Id.* at 636, n.4.

On January 18, 1996, KAL advised the court below of the *Zicherman* decision and requested permission to submit a supplemental brief to address the recoverability of nonpecuniary pre-death pain and suffering damages as a matter of law, in light of *Zicherman*. Respondents opposed the request, arguing that KAL had waived the argument by not addressing it in the opening briefs. The court below, rejecting the waiver argument, granted KAL's request and ordered that the parties file supplemental briefs. *See* Order (6th Cir. Jan. 26, 1996) (A 31a-32a).

In its supplemental brief, KAL argued that the holding and rationale of the Court in *Zicherman* precludes the recovery of all nonpecuniary damages, including pre-death pain and suffering damages. Respondents argued, again, that KAL had waived the argument with respect to pre-death pain and suffering damages and that such damages are recoverable pursuant to general maritime law.

3. The First Decision of the Court of Appeals - "*Bickel I*"

On April 29, 1996, the Court of Appeals decided that the intervening *Zicherman* decision precluded, as a matter of law, the recovery of *any* nonpecuniary damages under DOHSA. *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996)

("*Bickel I*"). The court, following the teaching of *Zicherman*, conducted a choice of law analysis and concluded that DOHSA supplies the applicable substantive United States damage law and, therefore, nonpecuniary damages for loss of society are not recoverable. *Bickel I*, 83 F.3d at 131-32 (A 24a-27a).

The court also set aside the awards for nonpecuniary damages for survivor's grief. The court held that it could not perceive any distinction that the Court in *Zicherman* would have approved that would permit recovery of one type of nonpecuniary damage and not another and, therefore, concluded that nonpecuniary damages for survivor's grief are not recoverable under DOHSA. *Id.* at 132 (A 26a-27a).

Finally, the court reversed the awards for nonpecuniary pre-death pain and suffering damages, stating:

> [W]e think the principle of *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases. Thus, for the same reasons we reversed the survivor's grief damages, we now reverse the award of pain and suffering damages.

Id. at 132 (A 27a-28a).

4. The Decision on Rehearing - "*Bickel II*"

On August 29, 1996, the court below granted rehearing and accepted (2-1) Respondents' waiver argument, an argument which the court had rejected twice before. *Bickel v. Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996), *amending on reh'g*, 83 F.3d 127 (6th Cir. 1996) ("*Bickel II*"). Circuit Judge Batchelder, the author of the unanimous *Bickel I* opinion, dissented.

The majority in *Bickel II* declined to address the argument that *Zicherman* rendered the legal basis for the district court's awarding of nonpecuniary pre-death pain and suffering damages invalid and that *Zicherman* precluded, as a matter of law,

the award of any nonpecuniary damages. The majority now held that KAL's failure to raise the "propriety" argument in its opening briefs precluded review by the court below, despite the intervening *Zicherman* decision. *Bickel II*, 96 F.3d at 153-54 (A 3a-5a).

Circuit Judge Batchelder dissented, finding the majority's reasoning not "persuasive" and that the majority had failed to explain why KAL must pay damages that are not available as a matter of law. *Bickel II*, 96 F.3d at 158-59 (A 15a-16a). The dissent reasoned:

1. The Court was bound to apply the unambiguous holding of *Zicherman* that where DOHSA governs, it governs exclusively and provides the sole source of damages. Because DOHSA permits only pecuniary damages, nonpecuniary pre-death pain and suffering damages are unavailable. *Id.* at 157 (A 11a).

2. While *Zicherman* does not directly address the propriety of pre-death pain and suffering damages, the only plausible reading of that case is that such damages, because they are not pecuniary damages, are not recoverable. Thus, *Zicherman* clarified the law relative to nonpecuniary damages available under DOHSA. *Id.* at 157-58 (A 11a-14a).

3. Finally, although KAL did not squarely aver in its opening briefs that such damages were not available under DOHSA, KAL should be allowed to make that claim in light of *Zicherman*, because this is one of those extraordinary cases in which the contrary result cannot be squared with applicable Supreme Court precedent. *Id.* at 158 (A 15a-16a).

5. The Post-*Zicherman* Decisions of Other Courts

On May 21, 1996, after the decision in *Bickel I*, but before the decision on rehearing in *Bickel II*, the Court of Appeals for the District of Columbia Circuit, invoking the general rule that an appellate court will not entertain an argument raised for the first time in a reply brief, declined to address KAL's

argument that the intervening decision in *Zicherman* rendered the legal basis for the award of nonpecuniary pre-death pain and suffering damages invalid as a matter of law. *Forman v. Korean Air Lines*, 84 F.3d 446, 448-49 (D.C. Cir. 1996). KAL's petition for a writ of certiorari in *Forman* currently is pending. *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 4, 1996).

On June 4, 1996, the KAL 007 multidistrict litigation transferee court revisited its pre-*Zicherman* ruling[8] that pre-death pain and suffering damages are recoverable under Article 17 of the Convention, and concluded that in light of *Zicherman*, such damages are not recoverable. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996) ("*In re KAL-DDC II*"), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

On August 2, 1996, the Court of Appeals for the Ninth Circuit rendered a decision in two KAL 007 disaster cases and held that, in light of *Zicherman*, nonpecuniary damages for pre-death pain and suffering are not recoverable under DOHSA or otherwise. *Saavedra v. Korean Air Lines*, 93 F.3d 547, 552-53 (9th Cir. 1996).[9] Plaintiffs' Petition for a Writ of Certiorari in *Saavedra* currently is pending. *Saavedra v. Korean Air Lines*, No. 96-623 (U.S., docketed Oct. 18, 1996).

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[8] That ruling was the basis of the decision that was affirmed by the Court of Appeals in *Forman*. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, MDL No. 565, Nos. 83-3587 *et al.*, memo. op. (D.D.C. Apr. 8, 1993) and *Forman v. Korean Air Lines*, No. 83-3587, memo. op. (D.D.C. June 6, 1995). These decisions are not officially reported but are reproduced in the Appendix at A 52a-55a and A 10a-32a to the Petition for a Writ of Certiorari in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 4, 1996).

[9] *Contra Beirn v. Korean Air Lines*, Nos. 83-4624, 83-4626, memo. op. (E.D.N.Y. Aug. 28, 1996) ("*Beirn*"). Reproduced in the Appendix at RA 14-29 to Respondent's Brief in Opposition in *Saavedra v. Korean Air Lines*, No. 96-623 (U.S., docketed Oct. 18, 1996).

REASONS FOR GRANTING THE PETITION

The lower courts have reached conflicting results as to the duty to apply the decision, rationale and principle of *Zicherman* to cases on appeal and awaiting trial, and as to the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages where DOHSA applies.

The court below allowed the parties to file post-*Zicherman* supplemental briefs to address the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages. On the basis of the supplemental briefs, the court in *Bickel I* held that *Zicherman* posed an "insuperable obstacle" to the recovery of such damages. *Bickel I*, 83 F.3d at 132 (A 27a-28a). On rehearing, the court held (2-1) that it now would decline to decide the issue because *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153 (A 4a). Thus, the court below upheld the awards of nonpecuniary pre-death pain and suffering damages based solely on Article 17 of the Warsaw Convention. *Id.*; *see Bowden*, 814 F. Supp. at 597-98 (A 42a-43a). This holding conflicts with the decision of the Court in *Zicherman* that damages cannot be based solely on the Convention.

The Ninth Circuit, in *Saavedra*, after receiving post-*Zicherman* supplemental briefs, rejected the waiver argument and held that it was "compelled" to apply the intervening decision of the Court in *Zicherman* and further held that *Zicherman* "effectively forecloses" any claims for nonpecuniary pre-death pain and suffering damages where DOHSA applies. *Saavedra*, 93 F.3d at 550-554.

The D.C. Circuit, after directing KAL and plaintiff to address the recoverability of nonpecuniary pre-death pain and suffering damages, in light of *Zicherman*, in their reply briefs, declined to "decide whether pre-death pain and suffering damages may not be recovered after *Zicherman*", invoking the

reply brief waiver rule. *Forman*, 84 F.3d at 448-49. The D.C. Circuit thereby upheld the district court's award of nonpecuniary pre-death pain and suffering damages based solely on Article 17 of the Warsaw Convention. The same district court, in light of *Zicherman*, has since reversed itself and, following *Zicherman*, has held that such damages are not recoverable. *See In re KAL-DDC II*, 935 F. Supp. at 15.

A direct conflict now exists between and among these decisions: (1) all three appeals arise out of the KAL 007 disaster; (2) the district courts in all three cases awarded pre-death pain and suffering damages based solely on the Warsaw Convention; (3) all three appeals were pending when *Zicherman* was decided; (4) all three Courts of Appeals directed the parties to file briefs to address the recoverability of pre-death pain and suffering damages in light of *Zicherman*; (5) *BUT*, while the court in *Saavedra* recognized that *Zicherman* rendered the district court's legal basis for the recovery of such damages untenable and, as a result, vacated the awards of pre-death pain and suffering damages, the court below and the court in *Forman* declined to address the argument and thereby upheld similar awards.

Certiorari is appropriate to resolve the conflict created by the post-*Zicherman* decisions in the lower courts and to reaffirm the principle that an intervening decision of the Court, interpreting a treaty and a statute, is required to be applied by lower courts in all pending cases, particularly those arising out of the same event as involved in the *Zicherman* case. Further, the Court should grant the Petition to clarify the scope of the principles enunciated in *Zicherman* as to the recoverability of nonpecuniary damages under the Warsaw Convention and DOHSA. Certiorari at this time will lead to the orderly conclusion of the KAL 007 litigation and will provide much needed guidance to the lower courts as to the exclusivity of the pecuniary damage standard of DOHSA in *all* cases involving a death on the high seas.

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH *ZICHERMAN*, DECISIONS OF THE COURT REQUIRING APPLICATION OF DECISIONS RETROACTIVELY TO PENDING CASES AND THE POST-*ZICHERMAN* DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

A. The Court Below Has Upheld an Award of Nonpecuniary Damages Even Though the Legal Basis for the Award Was Rejected by the Court in *Zicherman*

The interpretation of the Warsaw Convention by the Court in *Zicherman* is clear and direct: the Convention acts as "nothing more than a pass-through, authorizing [the courts] to apply the [damage] law that would govern in absence of the Warsaw Convention." 116 S. Ct. at 636. In rejecting the theory that damages are recoverable directly on the basis of the Convention alone, the Court in *Zicherman* eliminated the sole legal basis upon which the district court in these cases had allowed the recovery of all nonpecuniary damages, including pre-death pain and suffering damages. The decision of the Court of Appeals below, affirming the district court's allowance of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention, cannot be squared with *Zicherman*. When the holding of the district court is compared with the holding of *Zicherman*, the conflict is clear:

District Court Ruling:	***Zicherman Ruling:***
Nonpecuniary pre-death pain and suffering damages are within the meaning of "damage sustained" and, therefore, recoverable directly on the basis of Article 17 of the	"Damage sustained" in Article 17 means "legally cognizable harm" as defined by the applicable domestic law. Therefore, no damages are recoverable directly on the

Warsaw Convention. *Bowden*, 814 F. Supp. at 597-98 (A 40a-43a).

basis of Article 17 of the Convention. 116 S. Ct. at 632-35, 637.

The court below was required by *Zicherman* to find a domestic law basis for upholding the award of nonpecuniary pre-death pain and suffering damages, because *Zicherman* prohibits the award of *any* damages based solely on the Warsaw Convention. *Zicherman*, 116 S. Ct. at 635-37; *see Saavedra*, 93 F.3d at 553 ("just as survivor's grief and loss of society damages are unavailable directly under the Convention, the same is true for pain and suffering"). *Zicherman*, therefore, *obligated* the court below to address the question of whether nonpecuniary pre-death pain and suffering damages are recoverable under DOHSA, the applicable domestic law in these cases. *See Pescatore v. Pan Am World Airways*, 97 F.3d 1 (2d Cir. 1996); *Saavedra*, 93 F.3d at 552-54. In declining to address this question, the court below has erred and has let stand awards of damages based on a legal theory expressly rejected by the Court in *Zicherman*.

B. The Court Below Was Obliged to Apply to the Pending Appeals the Intervening Decision of the Court in *Zicherman*

The decision of the court below is in direct conflict with the strict rule that an appellate court has a duty to apply retroactively intervening decisions of the Court interpreting a statute or treaty to all cases still open to direct review. *Rivers v. Roadway Express*, 114 S. Ct. 1510, 1519 (1994); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540-45 (1991). The court below had no authority or discretion to decline to apply the decision, direction and principle of *Zicherman* interpreting the Warsaw Convention and DOHSA. Once the Court has spoken as to the proper interpretation of a statute or treaty,

> it is the *duty* of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute [or treaty] is an authoritative statement of what the statute [or treaty] meant before as well as after the decision of the case giving rise to that construction.

Rivers, 114 S. Ct. at 1519 (emphasis added). *See Harper*, 509 U.S. at 96 ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"); *see also Beam*, 501 U.S. at 540-45, 549; *In re Federated Dep't Stores*, 44 F.3d 1310, 1317 (6th Cir. 1995); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 362-63 (6th Cir. 1993).

The court below initially recognized its duty to address the effect of the intervening decision of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages, when the court, on the basis of KAL's post-*Zicherman* request, directed the parties to file supplemental briefs addressing the significance of *Zicherman*. *Bickel I*, 83 F.3d at 132 (A 26a-28a); Order (6th Cir. Jan 26, 1996) (A 31a-32a). On the basis of the supplemental briefs, the court below concluded that *Zicherman* precludes all nonpecuniary damages, including pre-death pain and suffering damages, stating:

> Despite the fact that the *Zicherman* Court was not asked to address the propriety of allowing a pain and suffering award, we think the principle of *Zicherman* constitutes an *insuperable obstacle* to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases.

Bickel I, 83 F.3d at 132 (emphasis added) (A 27a-28a).

On rehearing, however, the court (2-1) rejected the relevance of *Zicherman* and declined to apply the Court's construction of the Convention on the availability of non-

pecuniary pre-death pain and suffering damages in these appeals. *Bickel II*, 96 F.3d at 153-54 (A 3a-5a). The court on rehearing accepted Respondents' argument, twice previously rejected by the court, that KAL had waived the pre-death pain and suffering argument by not raising it in KAL's opening briefs. *Id.* The court sought to support its conclusion as to waiver on two grounds: (1) that *Zicherman* does not address the propriety of such damages, and (2) that *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153-54 (A 3a-5a).

Invocation of waiver cannot justify the refusal to apply the construction of the Warsaw Convention and DOHSA rendered by the Court while these cases were open to direct review. The court below ignores that, in light of *Zicherman*, the district court's theory that nonpecuniary pre-death pain and suffering damages are recoverable directly under Article 17 of the Warsaw Convention no longer is tenable, and that whether *Zicherman* changed the law is not relevant to retroactivity.[10] "When this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 114 S. Ct. at 1521, n.12; *see Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 256 (1970) (Black, J., dissenting).

Moreover, waiver is not applicable under the circumstances of these appeals. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Like any general rule of procedure, waiver should not be applied where its underlying justifications are absent. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Hormel*, 312 U.S. at 557-58; *Federal Savings & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 377, n.3 (11th Cir.

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[10] In fact, under the pre-*Harper/Beam* analysis in *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971), one of the factors in favor of retroactive application was that the decision did *not* change the law.

1987); *United Transp. Union v. Dole*, 797 F.2d 823, 827-28 (10th Cir. 1986). Application of "waiver" in these cases does not advance or serve any purpose of the rule.[11] In no sense could Respondents argue, nor did they argue, that they were ambushed or unable to respond to KAL's arguments. The court below had the benefit of the opposing views of the parties which were fully set forth in the supplemental briefs.

"Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel*, 312 U.S. at 557. The result of the decision of the court below is to let stand an erroneous decision of the district court, based on a legal analysis rejected by the intervening decision of the Court in *Zicherman*. "Thus viewed, this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice. . . ." *Hormel*, 312 U.S. at 560; *see Bickel II*, 96 F.3d at 157-59 (Batchelder, J., dissenting) (A 11a-17a).

The court in *Bickel I* and the Ninth Circuit in *Saavedra* properly determined the effect of the *Zicherman* decision on the district courts' awards of nonpecuniary damages in the cases pending on appeal. While the court in *Bickel I* followed the "path laid out" by the Court in *Zicherman*, the majority on rehearing in *Bickel II* has departed from the clear path of *Zicherman* and embarked upon the incorrect path charted by the court in *Forman*. Neither waiver nor any other procedural rule properly can be invoked to thwart the clear direction of the Court in *Zicherman* as to the meaning and effect of the Warsaw Convention and DOHSA. As Circuit Judge Batchelder stated, in dissenting from the majority decision on rehearing in *Bickel II*:

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[11] The purpose of the waiver rule is to prevent: (1) unfairness to an appellee who is unable to respond to an argument not raised in the opening brief and (2) an ill-advised opinion on the legal issue raised, because the Court has not had the benefit of an opposing view. *See Wright v. Holbrook*, 794 F.2d 1152, 1156-57 (6th Cir. 1986).

> . . . I would permit [KAL] to make that claim in light of the reasoning in *Zicherman*. I would do so, because this is one of those extraordinary cases in which the contrary result cannot be squared with applicable Supreme Court precedent.
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> * * *
>
> . . . [T]he majority rests its judgment not even on the shifting sands of its understandable desire to do equity in these cases. Rather, the majority constructs this judgment "upstairs above a vacant lot."

Bickel II, 96 F.3d at 158-59 (Batchelder, J., dissenting) (A 15a-17a).

Certiorari is required to ensure uniformity of decision with respect to the application of the intervening decision of the Court in *Zicherman*.

C. The Decision of the Court Below Is in Direct Conflict With the Post-*Zicherman* Decision of the Court of Appeals for the Ninth Circuit

Certiorari also is required to resolve the direct conflict created by the court below with a post-*Zicherman* decision of the Ninth Circuit arising out of the same event as involved in *Zicherman* and in these cases. In *Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-54 (9th Cir. 1996), the Ninth Circuit recognized that *Zicherman* "squarely rejected" the theory that nonpecuniary pre-death pain and suffering damages are recoverable directly under Article 17 of the Warsaw Convention. The court in *Saavedra* undertook an analysis of the applicable domestic law, DOHSA, and concluded, on the basis of *Zicherman*, that (1) DOHSA "will not brook pain and suffering relief" and (2) DOHSA cannot be supplemented with a "general maritime survival action for nonpecuniary damages, including pre-death pain and suffering" damages. *Id.* at 553-54.

The court below, in reversing on rehearing its prior decision in *Bickel I*, ignores *Saavedra* and effectively has upheld an award of nonpecuniary pre-death pain and suffering damages based solely on Article 17 of the Convention. *See Bickel II*, 96 F.3d at 157, n.1 (Batchelder, J., dissenting) (A 12a-13a).

Certiorari is required to bring the decision of the court below in line with the decision of the Court in *Zicherman* and to resolve the conflict created with the Ninth Circuit in *Saavedra*.

II

CONSIDERATIONS OF FAIRNESS AND PUBLIC CONFIDENCE IN THE JUDICIAL REVIEW PROCESS WARRANT REVIEW BY THE COURT

Immediately after the Court decided *Zicherman*, KAL sought permission in the court below, in the D.C. Circuit and in the Ninth Circuit, to file supplemental briefs addressing the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages in the cases still open to direct review. Each court granted KAL's request, over the objections of the plaintiffs based on waiver, and each court directed the parties to address the effect of *Zicherman* on the recoverability of nonpecuniary pre-death pain and suffering damages in the pending appeals.

However, each court resolved the matter differently. The Ninth Circuit addressed and decided the question, the D.C. Circuit declined to decide the question, and the court below first decided the question but then, on rehearing, decided not to decide the question.

In view of these conflicting results, involving cases arising from the same event and decisions all purporting to apply the same law, the preservation of the integrity of the judicial process warrants review by the Court.

The post-*Zicherman* argument advanced by KAL involved an important matter of treaty and statutory interpretation, subject to *de novo* review by the courts in the pending appeals. After *Zicherman*, the decision of the district court was patently incorrect and based on an improper interpretation of the Warsaw Convention and DOHSA. The court below was required to correct the district court's misinterpretation of the Convention and DOHSA, in light of *Zicherman*, as a matter of the proper administration of federal law. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991); *Dole*, 797 F.2d at 828.

Moreover, principles of fairness required the application of *Zicherman* to the pending appeals to resolve whether nonpecuniary pre-death pain and suffering damages are recoverable in the pending cases arising out of the same event as involved in *Zicherman*. The result of the decision of the court below is that Respondents have recovered a windfall award and KAL must pay millions of dollars in nonpecuniary damages[12] which are insupportable as a matter of law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486, n.16 (1981); *Bickel II*, 96 F.3d at 159 (Batchelder, J., dissenting) (A 16a). If *Zicherman* had been decided before briefing in the court below, the argument would have been addressed by KAL in the opening brief. The court below now penalizes KAL for advancing an argument not only made viable, but required, by the intervening *Zicherman* decision and addressed in a supplemental brief pursuant to the directive of the court below.

There now have been three post-*Zicherman* Circuit Court decisions in cases arising out of the KAL 007 disaster, resulting in three different conclusions as to the effect and meaning of the intervening decision of the Court in *Zicherman* on the

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[12] There have been 16 separate awards for pre-death pain and suffering damages arising out of the KAL 007 disaster ranging from $0 to $1.35 million, totaling $5,165,000, excluding prejudgment interest.

pending appeals. Considerations of fairness, judicial integrity, and the public's perception of judicial proceedings, warrant review by the Court. *See United States v. Atkinson*, 297 U.S. 157, 160 (1936).

III

THE COURT BELOW HAS DECLINED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED

The court below passed upon the issue of the legal recoverability of nonpecuniary pre-death pain and suffering damages in both *Bickel I* and *Bickel II*. *See Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995). The court in *Bickel I* directly addressed the argument and the court in *Bickel II*, by considering the sufficiency of the evidence to support the awards of pre-death pain and suffering damages, necessarily passed upon the antecedent question of whether nonpecuniary pre-death pain and suffering damages are recoverable as a matter of law. *See U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 445-47 (1993); *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Thus, the "substantive issue" was addressed by the court below in *Bickel II*, albeit not directly.

The question of the preclusive effect of *Zicherman* and DOHSA on the recoverability of nonpecuniary pre-death pain and suffering damages involves an important question of federal law present in each of the pending KAL 007 disaster cases[13], and arises in almost every death case occurring on the high seas, in both the aviation and non-aviation context. Certiorari should be granted to resolve the conflict that has now developed and to provide an early and definitive guide for the

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[13] Twenty-five (25) cases are pending on appeal or in the district court.

lower courts so as to avoid further inconsistent results in this and other litigation involving DOHSA.

Before *Zicherman*, *all* courts allowed § 762 of DOHSA to be supplemented with nonpecuniary pre-death pain and suffering damages under either the Convention, state law, general maritime law or a combination thereof. *See* authorities cited *supra* notes 6, 7 & 8. In the only pre-*Zicherman* case which denied an award of nonpecuniary pre-death pain and suffering damages, in a Warsaw Convention case involving DOHSA, the district court held that such damages, nevertheless, were recoverable on the basis of the Convention alone. *Hawaii II*, 783 F. Supp. at 1264-65; *In re Air Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 792 F. Supp. 1541, 1546 (N.D. Cal. 1990). This was the same legal theory relied upon by the district court below in allowing the awards in these cases. This legal theory now has been rejected and rendered invalid by the Court in *Zicherman*.

Although the recoverability of loss of society damages was the only issue directly addressed in *Zicherman*, the post-*Zicherman* courts that have addressed the recoverability of pre-death pain and suffering damages, save one[14], have concluded that the reasoning of *Zicherman* forecloses the recovery of any nonpecuniary damages under DOHSA, including pre-death pain and suffering damages. *Zicherman* made what was once a non-viable argument, viable and controlling.

The court below originally found that "*Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages". *Bickel I*, 83 F.3d at 132 (A 27a-28a). The majority in *Bickel II*, reversing itself on rehearing, offered no explanation as to how *Zicherman* could pose an "insuperable obstacle" in April, but that in August, *Zicherman* "neither added to, nor made any changes in the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153 (A 4a). As succinctly explained by the dis-

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14 *Beirn*, memo. op. (E.D.N.Y. Aug. 28, 1996).

sent in *Bickel II*, *Zicherman* "made it crystal clear that where DOHSA governs, it governs exclusively":

> *Zicherman*, it is true, does not directly address the propriety of pre-death pain and suffering damages. But the only plausible reading of that case is that such damages, because they are not pecuniary damages, are not recoverable. *See Saavedra*, 93 F.3d at 553.
>
> * * *
>
> [A]s a federal judge, and not a federal legislator, I am bound to apply DOHSA, not as it may seem "just" to me, but as it is written, and as it has been interpreted by the highest judicial authority in the land. . . .

Bickel II, 96 F.3d at 157, 159. (Batchelder, J. dissenting) (A 13a, 16a).

The Ninth Circuit in *Saavedra* found:

> the Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims.

93 F.3d at 550-51; *see In re KAL-DDC II*, 935 F. Supp. at 15.

It is significant that the court in *Bickel I* and the Ninth Circuit in *Saavedra*, in directly addressing the effect of *Zicherman*, concluded that nonpecuniary pre-death pain and suffering damages are not recoverable, despite earlier contrary holdings of the First, Second, Third and Fifth Circuits and numerous district courts. *See* authorities cited *supra* notes 6 & 7.

Pending in the D.C. Circuit are three additional appeals, which were fully briefed prior to *Zicherman*, but which were held in abeyance awaiting the decision in *Zicherman*. The court now has ordered that the appeals be rebriefed, pre-

sumably in light of *Zicherman*. Also pending in the D.C. Circuit is an interlocutory appeal from the district court's post-*Zicherman* decision, reversing its prior decision allowing the recovery of nonpecuniary pre-death pain and suffering damages on the basis of the Convention alone. *In re KAL-DDC II*, 935 F. Supp. 10, 15 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

In addition to the appeals pending in the D.C. Circuit, there are three KAL 007 disaster cases awaiting trial in the Eastern District of New York, where the trial court has held, post-*Zicherman*, that nonpecuniary pre-death pain and suffering damages are recoverable under DOHSA. *Beirn*, memo. op. (E.D.N.Y. Aug. 28, 1996). There are four KAL 007 disaster cases awaiting trial in the Central District of California where the trial courts, pursuant to *Zicherman* and *Saavedra*, have dismissed all claims for nonpecuniary pre-death pain and suffering damages.

The Court should grant certiorari to resolve the inconsistent and conflicting post-*Zicherman* rulings in the KAL 007 disaster litigation and the conflict which now exists between the Ninth Circuit and the First, Second, Third and Fifth Circuits (*see supra* notes 6 & 7) as to the recoverability of nonpecuniary pre-death pain and suffering damages under DOHSA generally.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted in all respects.

Dated: November 19, 1996

Respectfully submitted,

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APPENDIX

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Nos. 93-2144/2259/2549;
94-1095/1096/1098/1100/1101

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAISY E. BICKEL, Representative for Edna Doris Miller; DOROTHY JONES, Estate of Joyce Chambers; WILLIE N. JAMES, Personal Representative of the Estate of Hazel Jeanne James,
Plaintiffs-Appellees,

RICHARD A. BOWDEN, Individually and as Personal Representative of the Estate of Eleanor Beatrice Young Bissell,
Plaintiff-Appellee, Cross-Appellant (94-1098),

MICHAEL D. JONES, Personal Representative of the Estate of Margaret Zarif, a/k/a Margaret Jones,
Plaintiff-Appellee, Cross-Appellant (94-1101),

ON APPEAL from the United States District Court for the Eastern District of Michigan

v.

KOREAN AIR LINES COMPANY, LTD.,
Defendant-Appellant
(93-2144/2259/2549;
94-1095/1096/1100),
Cross-Appellee.

Decided and Filed August 29, 1996

AMENDED OPINION

Before: MERRITT, Chief Judge; BROWN and BATCHELDER, Circuit Judges.

BROWN, J., delivered the opinion of the court, in which MERRITT, C. J., joined. BATCHELDER, J. (pp. 11-17), delivered a separate dissenting opinion.

BAILEY BROWN, Circuit Judge. This case first came before this panel on January 31, 1995, and was the subject of a prior opinion (*Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996)), in which we, *inter alia*, reversed the awards for predeath pain and suffering which each plaintiff won at trial. After we filed that opinion, the plaintiffs filed a Motion for Rehearing with a Suggestion for Rehearing *En Banc*, in which they alleged that we erred in reversing the predeath pain and suffering awards. After reviewing the plaintiffs' motion, and the defendant's response to it, we GRANT the motion and withdraw Section II, Part C and Section III of our prior opinion. We replace those portions of our prior opinion with the following text:

C.

In a supplemental brief filed after the Supreme Court announced its opinion in *Zicherman*, KAL urges us to reverse the awards for the decedents' predeath pain and suffering which the plaintiffs' won at trial. KAL argues that, even though the Supreme Court expressly stated in *Zicherman* that the question of the propriety of the predeath pain and suffering awards was not before it, 116 S. Ct. at 636 n.4, such awards cannot be squared with the Court's recognition that, under section 762 of DOHSA, plaintiffs may recover pecuniary damages only. In response, the plaintiffs argue (1) that KAL waived this issue when it failed to raise it in its opening briefs to this court, and (2) that DOHSA, a wrongful death statute, has no effect on their right to recover nonpecuniary predeath pain and suffering damages through a maritime common law survival action. *See Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 575 n.2 (discussing the differences between wrongful death actions and survival actions). Because we agree with the plaintiffs' first argument, we express no opinion on their second one.[1]

Federal Rule of Appellate Procedure 28(a) requires that an appellant's brief include "a statement of the issues presented for review," and "[a]n argument" on each issue presented. While KAL appealed the issue of the **sufficiency of the evidence** to support the various predeath pain and suffering awards in the five trials below, none of the six opening briefs KAL submitted to this court identifies as an issue for appeal the **propriety** of allowing any such awards. "We normally decline to consider issues

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[1]We note, however that other circuits have allowed plaintiffs to recover predeath pain and suffering damages on maritime common law survival claims while collecting pecuniary wrongful death damages on a DOHSA claim. *E.g. Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974).

not raised in the appellant's opening brief[s]." *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989). KAL argues that we should not apply this rule to the instant appeal, however, contending that after it filed its opening briefs, the Supreme Court's decision in *Zicherman* intervened and changed the law on the availability of predeath pain and suffering damages. This contention is incorrect. As noted above, *Zicherman* does not address the propriety of the predeath pain and suffering damages awarded at trial in that case, and that award stands to this day. *See Zicherman*, 116 S. Ct. at 636 n.4 (noting that KAL did not challenge the validity of the predeath pain and suffering award in its petition for certiorari).

Moreover, in stating that DOHSA disallows recovery of nonpecuniary loss of society damages, the *Zicherman* court merely followed settled law. The Court decided that question almost twenty years ago in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). The *Zicherman* opinion therefore neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA. Thus, any argument that KAL could make based on the fact that DOHSA does not allow nonpecuniary damages was available to it **before** the Court decided *Zicherman*, and therefore KAL could have raised this issue in its opening briefs.[2]

Indeed, in *Forman v. Korean Air Lines*, 84 F.3d 446, 448-49 (D.C. Cir. 1996), the D.C. Circuit refused to address the very argument KAL urges to us here, on the ground that KAL did not raise the issue until after the Supreme Court decided *Zicherman*, when KAL raised it in a reply brief. The court noted that "[t]he argument that pre-death pain and suffering damages are not available if

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[2]In fact, the record reflects that KAL presented the district court with the same argument it advances in its supplemental brief at a consolidated pretrial motions hearing on December 21, 1992. *Joint Appendix* at 701-02.

DOHSA applies has been raised numerous times before *Zicherman*." *Compare, e.g., Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984) (allowing plaintiff to recover nonpecuniary survival damages under general maritime common law along with pecuniary wrongful death damages under DOHSA) *with In re Air Crash Disaster Near Honolulu, Hawaii*, 792 F. Supp. 1541, 1545-46 (N.D. Cal. 1990) (holding that DOHSA preempted survival actions). Because KAL initially failed to challenge the propriety of awarding damages for predeath pain and suffering, and because *Zicherman* does not alter the state of the law on the availability of such awards, we decline to address this belatedly raised issue.

D.

Finally, KAL has challenged (1) the admission of videotaped expert testimony in two of the trials below, (2) the sufficiency of the evidence presented at each of the trials below to support the awards of predeath pain and suffering, and (3) the district court's failure to remit the predeath pain and suffering awards in three of the cases. We will address these issues *seriatim*.

Videotaped Expert Testimony

Five KAL Flight 007 damages cases went to trial in the Eastern District of Michigan before the Honorable Anna Diggs Taylor, and all five of them are consolidated in this appeal. The first of the five cases to go to trial was the *Bowden/Bissell* case.[3] At trial in *Bowden/Bissell*, the plaintiffs presented the testimony of two experts. James McIntyre, a retired naval officer and former commercial airline pilot, testified regarding the emergency operation of

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[3] In their briefs, the parties refer to the individual cases in this manner, *i.e., (personal representative)/(decedent)*. For the sake of consistency, and to avoid confusion, we will do the same.

a Boeing 747. Robert Elzy, a former naval officer who is an aviation physiologist, testified regarding the physical effects which the attack and the subsequent decompression and recompression of the aircraft might have had on the passengers. The plaintiff videotaped the experts' testimony so that it would be available to other plaintiffs for use in subsequent trials, should the experts be unavailable to testify in person. As it turned out, this *Bowden/Bissell* trial ended in a mistrial, and the case was later retried. The plaintiffs presented the videotaped expert testimony in the subsequent *Bowden/Bissell* trial, as well as at the four other damages trials. KAL now appeals the admission of the videotaped testimony in two of those trials: *Bowden/Bissell* and *Jones/Zarif*.

We review this matter for an abuse of discretion. *See United States v. Phillips*, 888 F.2d 38, 40 (6th Cir. 1989) "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *In re Bendectin*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). In *Bowden/Bissell*, the plaintiff informed the court on the day the trial began, April 27, 1993, that he wished to use the videotaped testimony because the two experts were testifying in a KAL Flight 007 damages case in Washington, D.C. at the time. Finding that the witnesses were unavailable, and that KAL had sufficient motive and opportunity to cross examine the experts at the prior trial, the district court allowed the videotaped testimony under Federal Rule of Evidence 804(b)(1) and Federal Rule of Civil Procedure 32(a)(3)(B). Thus, on April 27, the plaintiff began playing McIntyre's videotaped testimony. Before the plaintiff resumed playing that testimony on April 28, KAL presented the court with the declaration of a defense attorney in the Washington case, which indicated that McIntyre had completed his testimony in that case on April 26, and that Elzy had completed his testimony on the 27th. The defendants therefore argued that the experts were no longer "unavailable" and could have flown directly to Detroit and

testified live. Nonetheless, the district court allowed the videotaped testimony to continue.

KAL contends this was an abuse of discretion. We disagree. While, in retrospect, it appears that the two experts could have wound up their testimony in Washington, caught an evening flight to Detroit, and been available to testify there the following morning, we must review the district court's decision with an appreciation for the difficulties of ensuring the smooth progression of the proceedings in its court. When the court initially decided to allow the videotaped testimony, it did not know that the experts would finish their testimony in Washington in time to appear in Detroit. Once KAL informed the court that the experts had concluded their Washington testimony, the plaintiff was already in the middle of offering the videotaped testimony. Ordering the plaintiff to produce one or both of the witnesses for live testimony could have resulted in a substantial delay. Considering that the testimony that the experts would have given "live" was substantially the same as the testimony on videotape, and that the videotaped testimony occurred at a prior trial in this same case, we are not "firmly convinced" that the district court erred in allowing the videotaped testimony to continue.

Zarif/Jones was the last of the five cases to come to trial, and, unlike the previous four cases, it was tried to the bench rather than to a jury. As in each of the previous cases, however, the plaintiff in *Zarif/Jones* sought to use the videotaped expert testimony of McIntyre and Elzy, claiming that the experts were "bound by prior commitments." KAL again objected, arguing that "live" testimony is important in assisting the trier of fact in credibility determinations. The district court responded:

> Well, I am going to proceed with the Plaintiff's case and will permit the Plaintiff's experts to be heard by video tape here. The Court has heard them in person, seen them cross-examined more than once, each of

them, and seen the video tapes. I don't think the credibility determination will be that crucial.

Once again, we cannot say that the district court erred in allowing the plaintiff to present videotaped testimony. Assuming the truth of the plaintiff's claims that the experts were unavailable to testify at the times for which the trial was scheduled, the district court again had to balance the need for viewing the witnesses live against the substantial scheduling concerns attendant to conducting a trial in federal district court. Considering that Judge Taylor had seen the plaintiff's experts testify live, and that this case was tried to the bench rather than to a jury, we will not disturb the district court's ruling.[4]

Sufficiency of the Evidence

KAL has challenged the sufficiency of the evidence presented in each trial below to support the various awards of predeath pain and suffering. In reviewing the sufficiency of the evidence, we consider the evidence in the light most favorable to the plaintiffs. *Molton v. City of Cleveland*, 839 F.2d 240, 241-42 (6th Cir. 1988), *cert. denied*, 489 U.S. 1068 (1989). At the trials below, the plaintiffs presented evidence from which a jury could infer that each passenger (1) survived the initial explosion which caused a hole in the rear section of the fuselage, (2) donned an emergency oxygen mask, and (3) remained conscious during the twelve minute descent into the Sea of Japan, suffering the physical effects of decompression and

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[4] It bears noting that there is evidence in the record of another trial, the *Jones/Chambers* trial, indicating that the district court anticipated the use of the videotaped testimony in all of the trials when it granted KAL's request to try each action separately. In *Jones/Chambers*, the court, discussing the use of the videotaped testimony, stated: "I want to remind you that if the court had been aware that you would have insisted on the presence of the plaintiff's experts at every trial, maybe I would have looked more closely at this insistence that there be six different trials."

recompression along the way, as well as the horror of knowing that death was imminent. This evidence was sufficient to support awards for predeath pain and suffering in these cases. *Accord Forman v. Korean Air Lines*, 84 F.3d 446, 449 (D.C. Cir. 1996) (affirming predeath pain and suffering award in a KAL Flight 007 case on evidence essentially the same as that presented in the cases before us); *Hollie v. Korean Air Lines*, 60 F.3d 90, 92-93 (2d Cir. 1995) (same), *judgment vacated on other grounds and case remanded*, 116 S. Ct. 808 (1996); *Zicherman v. Korean Air Lines*, 43 F.3d 18, 23 (2d Cir. 1994) (same), *rev'd in part on other grounds*, 116 S. Ct. 629 (1996).

Remittitur

KAL also appeals from the district court's refusal to remit the predeath pain and suffering awards in (1) *Jones/Chambers*, where the jury awarded $400,000 in predeath pain and suffering damages; (2) *Bowden/Bissell*, where the jury awarded $1,350,000 in predeath pain and suffering damages; and (3) *Jones/Zarif*, where the court awarded $1,000,000 in predeath pain and suffering damages.

This court reviews a district court's denial of a motion for a remittitur for an abuse of discretion. *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (1993), *cert. denied*, 115 S. Ct. 56 (1994). District court's should grant such motions only "if the award *clearly* exceeds 'the amount which, under the evidence in the case was the maximum that a jury could reasonably find to be compensatory' for the plaintiff's loss." *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988) (quoting *Manning v. Altec, Inc.*, 488 F.2d 127, 133 (6th Cir. 1973)). "Unless the award is (1) beyond the range supportable by proof or (2) so excessive as to shock the conscience, . . . or (3) the result of a mistake, we must let the award stand." *Leila Hosp. & Health Ctr. v. Xonics Medical Sys.*, 948 F.2d 271, 278 (6th Cir. 1991).

The district court did not abuse its discretion in denying KAL's motions. It is impossible to determine the exact value of the pain and suffering which the decedents may have endured. In reviewing these three challenged awards, we acknowledge that the proof in these cases would support findings by the three factfinders (two different juries and the district judge) that the decedents (1) remained conscious during the entire twelve minute descent of the aircraft, (2) suffered substantial physical pain during the descent, and (3) knew they would die upon impact. One simply cannot quantify the mental and physical pain and suffering such an experience would cause, and thus we cannot conclude that the evidence does not support the awards. Since there is no basis for concluding that the factfinders made "mistakes" (either in their findings or their arithmetic, if any), we will reverse the district court and remit these awards only if they "shock our conscience." They do not.

III.

For the forgoing reasons, we REVERSE in part and AFFIRM in part the judgments of the district court. We REMAND these cases for the entries of judgments consistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, dissenting. As the majority points out, when these cases first came before us, we issued an opinion in which, *inter alia*, we reversed the awards for pre-death pain and suffering ("pain and suffering awards") that the plaintiffs had won at trial. *Bickel v. Korean Air Lines Co.*, 83 F.3d 127 (6th Cir. 1996). We reasoned that the Supreme Court's recent decision in *Zicherman v. Korean Air Lines*, — U.S. —, 116 S. Ct. 629 (1996), holding that non-pecuniary damages were not available under the Death on the High Seas Act, 46 U.S.C.A. § 761 *et seq.* (West 1975) ("DOHSA"), applied, as well, to the non-pecuniary damages for pre-death pain and suffering awarded in these cases.

Today, a majority of the panel reverses that decision and reinstates the awards recovered in the district court for the decedents' pre-death pain and suffering. The majority reasons that Korean Air Lines Company, Ltd. ("KAL"), waived any argument relative to the availability of pain and suffering awards by failing to raise the argument in its opening briefs. Because I continue to believe that DOHSA exclusively governs these cases, that DOHSA, both in its plain language and as interpreted by *Zicherman*, does not provide for non-pecuniary damages, and that the pre-death pain and suffering awards at issue in these cases are non-pecuniary and, therefore, not recoverable under DOHSA, I dissent.

The majority correctly observes that in its opening briefs, KAL did not argue that pain and suffering awards were unavailable under DOHSA. The majority acknowledges that KAL appealed the sufficiency of the evidence to support the pre-death pain and suffering awards, but bears down on KAL's failure to appeal what it terms "the **propriety** of allowing any such awards." Maj. op. at 3 (emphasis in original). The majority offers two bases for its conclusion that KAL's failure timely to raise its "propriety" claim precludes our review. First, the majority explains: "*Zicherman* does not address the propriety of the predeath pain and suffering damages awarded at trial in that

case, and that award stands to this day." *Id.* (citing *Zicherman*, 116 S. Ct. at 626 n.4). And second, *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Id.* at ¶ 5. Therefore, the majority concludes, KAL could have argued against the availability of pre-death pain and suffering awards *before Zicherman* and in its opening briefs. I do not find the majority's reasoning persuasive.

In a purely technical sense, I have no quarrel with the majority's observation that *Zicherman* did "not address the propriety of the predeath pain and suffering damages awarded at trial in that case[.]" Maj. op. at 4 (citing *Zicherman*, 116 S. Ct. at 626 n.4). Accordingly, the propriety of such damages remains an open question for the Supreme Court to address in a future case—perhaps even this one. Until the Court renders such a ruling, however, we are bound by the principles of *Zicherman*, and I think that there is no getting around the flat, unambiguous holding of *Zicherman* that where DOHSA governs (as it, without question, does here), it governs exclusively; it provides the sole source of damages recoverable; and permits only pecuniary damages. *See Zicherman*, 116 S. Ct. at 636-37. *See also Saavedra v. Korean Air Lines Co., Ltd.*, Nos. 94-55018/55495/55060/55496/55161, 1996 WL 431734, *6 (9th Cir. Aug. 2, 1996).[1] I detect nothing by

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[1]The Ninth Circuit in *Saavedra* recently had occasion to consider the availability of pre-death pain and suffering damages in cases such as the ones presently before us. Building upon the reasoning of *Zicherman*, as well as the conclusion we originally reached in these cases, the Ninth Circuit held in a thoughtful opinion that pre-death pain and suffering awards were neither available under DOHSA, nor under a general maritime survival theory. *See Saavedra*, 1996 WL 431734, at *5-*7. Although KAL unquestionably challenged the availability of pre-death pain and suffering awards when it initially argued its case before the Ninth Circuit, *see id.* at *2, that court's conclusion in *Saavedra* only underscores the peculiarity of the holding embraced by the majority here. Implicitly, *Saavedra* reaffirms that the awards

way of disagreement from the majority's opinion; indeed, section II.B. of the original panel opinion in this case (holding that neither loss of society nor survivor's grief is recoverable under DOHSA) remains undisturbed. *Bickel*, 83 F.3d at 131-32.

Zicherman, it is true, does not *directly* address the propriety of pre-death pain and suffering damages. But the only plausible reading of that case is that such damages, because they are not pecuniary damages, are not recoverable. *See Saavedra*, 1996 WL 431734, at *6. Today's majority overlooks this point, and by doing so, avoids having to explain how KAL's procedural default (of not raising the argument in their opening briefs) can suffice to sustain liability for pain and suffering damages where such damages are not available as a matter of law.

KAL argues, and this panel originally agreed, that, although pre-death pain and suffering awards were not squarely before the Supreme Court in *Zicherman*, DOHSA does not provide for such damages because they are non-pecuniary in nature. *Id.* at 132. Accordingly, we concluded that:

> *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases. Thus, for the same reasons we reversed the survivor's grief damages, we now reverse the award of pain and suffering damages.

Id.

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reinstated by the majority are not based on any form of damages created by an act of legislative discretion or otherwise permissible judicial fiat. I admit that I am somewhat mystified how the majority opinion can, as it does, let *Saavedra* pass, entirely without mention.

The majority now retreats from that position, giving as its second reason for affirming the non-pecuniary damage awards for pre-death pain and suffering that:

> The *Zicherman* opinion . . . neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA. Thus, any argument that KAL could make based on the fact that DOHSA does not allow nonpecuniary damages was available to it **before** the Court decided *Zicherman*, and therefore, KAL could have raised this issue in its opening briefs.

Maj. op. at 4 (emphasis in original). I cannot agree.

Zicherman, whatever else may be said of it, clarified the law relative to non-pecuniary damages available under DOHSA. "Moreover, where DOHSA applies, neither state law nor general maritime law can provide a basis for recovery of loss-of-society damages." *Zicherman*, 116 S. Ct. at 636 (citations omitted). *See Saavedra*, 1996 WL 431734, at *6 (noting that "[t]he Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages"). I do not dispute that the relevant Supreme Court case law logically, perhaps ineluctably, led the *Zicherman* Court to rule as it did, but it is nevertheless not entirely accurate to characterize *Zicherman* as neither adding to, nor making *any* changes in, the law of damages available under DOHSA. But even if the majority were correct, I do not comprehend the logic of leaving these non-pecuniary damage awards to stand when such awards,

as the majority implies, have not been available directly under DOHSA for years.[2]

Assuming *arguendo* that *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA[,]" maj. op. at 4; *but see Saavedra*, 1996 WL 431734, at *2 (observing that "[m]any of the issues raised before [the Ninth Circuit] were resolved for the first time in . . . *Zicherman*"), still *Zicherman* made it crystal clear that where DOHSA governs, it governs exclusively. *Zicherman*, 116 S. Ct. at 636. And because where DOHSA governs, it governs exclusively, on the facts of the case before us (where DOHSA unquestionably governs) no pre-death pain and suffering damages are available, for such damages are non-pecuniary in nature. *See Saavedra*, 1996 WL 431734, at *5-*7.

Although KAL did not squarely aver in its opening briefs that pain and suffering awards were not available under DOHSA, I would permit it to make that claim in light of the reasoning in *Zicherman*. I would do so, because this is one of those extraordinary cases in which the contrary

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[2] As cases cited in the majority opinion indicate, pain and suffering damages in cases such as the ones before us have not been available directly under DOHSA, but have rested on some other source of law. See maj. op. at 3 n.1 (and authorities collected therein). *See also Solomon v. Warren*, 540 F.2d 777, 792 (5th Cir. 1976) (permitting recovery for decedent's pain and suffering on the theory that state law provides a cause of action for such damages), *cert. dismissed*, 434 U.S. 801 (1977); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 480 (N.D. Cal. 1987) (permitting recovery for decedent's pain and suffering on the theory that general maritime law provides a cause of action for such damages); *In re Air Crash Disaster Near Honolulu, Haw., on Feb. 24, 1989*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992) (permitting recovery for decedent's pain and suffering on the theory that the Warsaw Convention provides a cause of action for such damages). As the Ninth Circuit recently pointed out, however, *Zicherman* precludes such "supplemental" damages awards. *See Saavedra*, 1996 WL 431734, at *7.

result cannot be squared with applicable Supreme Court precedent. *See United States v. Chesney*, 86 F.3d 564, 567-68 (6th Cir. 1996) (noting that we have discretion to review an issue not properly preserved for direct appeal in "exceptional cases or particular circumstances," and exercising the discretion to square the ruling in the case with recent, relevant Supreme Court precedent).

After carefully reviewing the majority's opinion, I have little doubt that the majority and I do not disagree very much about the harshness of the result in this case if DOHSA were to be exclusively applied. But as a federal judge, and not a federal legislator, I am bound to apply DOHSA, not as may seem "just" to me, but as it is written, and as it has been interpreted by the highest judicial authority in the land. *See, e.g.*, THE FEDERALIST No. 78, at 468-49 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[3] And there is simply nothing in the language of DOHSA and nothing in *Zicherman* (or any other case to which the majority points) that leads me to believe there is any principled way to avoid the conclusion that there is no basis in the law for the pre-death pain and suffering awards which today's majority upholds. Yet, the majority defaults KAL and holds that it must pay damages that are not available as a matter of law. In doing so, the majority rests its judgment not even on the shifting sands of its

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[3] As Hamilton observed:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything would prove that there ought to be no judges distinct from that body.

understandable desire to do equity in these cases. Rather, the majority constructs this judgment "upstairs above a vacant lot."

Nos. 93-2144/2259/2549;
94-1095/1096/1098/1100/1101

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAISY E. BICKEL, Representative for Edna Doris Miller; DOROTHY JONES, Estate of Joyce Chambers; WILLIE N. JAMES, Personal Representative of the Estate of Hazel Jeanne James,
Plaintiffs-Appellees,

RICHARD A. BOWDEN, Individually and as Personal Representative of the Estate of Eleanor Beatrice Young Bissell,
Plaintiff-Appellee, Cross-Appellant (94-1098),

MICHAEL D. JONES, Personal Representative of the Estate of Margaret Zarif, a/k/a Margaret Jones,
Plaintiff-Appellee, Cross-Appellant (94-1101),

ON APPEAL from the United States District Court for the Eastern District of Michigan

v.

KOREAN AIR LINES COMPANY, LTD.,

Defendant-Appellant
(93-2144/2259/2549;
94-1095/1096/1100),
Cross-Appellee.

Decided and Filed April 29, 1996

Before: MERRITT, Chief Judge; BROWN and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. The underlying facts of these cases are quite notorious. They have been set forth in some considerable detail elsewhere, *see In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1477-1479 (D.C. Cir.) (*Korean Air*), *cert. denied*, 112 S. Ct. 616 (1991), and it is, therefore, unnecessary to do so again here. In short, on September 1, 1983, a Korean Air Lines (KAL) airliner *en route* from New York to Seoul, South Korea, strayed into the airspace of the former U.S.S.R. The KAL airliner crashed into the Sea of Japan after being struck by missiles fired from a U.S.S.R. military fighter plane. The crash killed all 269 persons aboard. Personal representatives of five of those killed in the incident brought these actions against KAL in the federal district court sitting in Michigan. After the actions were tried in the district court, the parties timely appealed.

I.

The Warsaw Convention provides a cause of action for injuries and deaths occurring on international commercial flights, such as the KAL flight at issue in these cases. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C.A. § 1502 (West 1976) ("Warsaw Convention"); *In re Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1273-74 (2d Cir.), ("*Lockerbie I*"), *cert. denied*, 112 S. Ct. 331 (1991).

Ordinarily, recovery under the Warsaw Convention is limited to $75,000. *See* Article 22(1), Warsaw Convention; Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C.A. § 1502 (West 1976) (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) ("Montreal Agreement") (raising amounts recoverable under the Warsaw Convention to $75,000). In these cases, however, because KAL's "willful misconduct" proximately caused the passengers' deaths,[1] the $75,000 limit has been lifted. *See* Article 25(1), Warsaw Convention.

The suits which form the basis for the instant appeal proceeded to trial on the issue of compensatory damages.

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[1]The Judicial Panel on Multidistrict Litigation transferred all federal court actions arising out of the KAL crash, including these, to the District of Columbia for trial on the common issue of liability. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342 (J.P.M.L. 1983). A jury found that the crash was proximately caused by KAL's "willful misconduct." *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.) (*Korean Air*), *cert. denied*, 112 S. Ct. 616 (1991). Thereafter, the Multidistrict Panel remanded the individual cases to their courts of origin to determine damages. In the cases at bar, the proceedings were returned to the Eastern District Court of Michigan, Judge Taylor presiding.

All the cases, except the one brought by Michael Jones on behalf of decedent Margaret Zarif, were tried to a jury. Jones' suit was tried to the bench.

At each trial, KAL moved to have the district court hold as a matter of law: (1) that the Death on the High Seas Act ("DOHSA"), 46 U.S.C.A. § 761 *et seq.* (West 1975), governed the question of who were the proper beneficiaries for pecuniary damages or, in the alternative, (2) that if non-pecuniary damages were allowed, such damages would only be recoverable by spouses and financially dependent relatives. The district court denied KAL's motions and held that the plaintiffs' non-dependent relatives were beneficiaries entitled to recover pecuniary, as well as non-pecuniary, damages.

Plaintiffs received varying sums as non-pecuniary damages for wrongful death and survival, including loss of society, survivor's grief, and pain and suffering of the deceased.

II.

Article 17 of the Warsaw Convention makes an airline liable for "damage sustained" in the event of the death of a passenger:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17, Warsaw Convention.

Article 24(2) of the Warsaw Convention states that every action for damages covered by Article 17 is subject to the conditions and limits of the Convention, "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

Article 24(2), Warsaw Convention. Thus, as the Supreme Court recently noted in *Zicherman v. KAL*, 116 S. Ct. 629, 632-635, 637 (1996), the domestic law of a party to the Warsaw Convention determines who can bring an action and what "damages sustained" they can recover. *See also Mertens v. Flying Tiger Lines*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

A.

Because Article 24(2) of the Warsaw Convention requires courts to measure damages according to the internal law of a party to the Convention, we must provide a choice of law analysis to decide which nation's law to apply. *See Zicherman*, 116 S. Ct. at 637 (concluding that the Warsaw Convention leaves the specification of legally cognizable harm to be determined under the forum's choice-of-law rules).

Jurisdiction in these cases was based only in part on diversity. In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941), the Supreme Court held that a federal court sitting in diversity must apply the law of the state in which it sits. *Id.* at 496. The diversity of citizenship here, however, is not the sort of diversity that *Klaxon* addressed when it announced its rule. We do not here have parties who are citizens of different states of the United States. Instead, the parties here are citizens of the United States, on the one hand, and a foreign national, KAL, on the other. Additionally, unlike the dispute in *Klaxon*, these cases arise under 28 U.S.C. § 1331 (because they involve the interpretation of the Warsaw Convention) and 28 U.S.C. § 1333 (because they involve DOHSA which provides for a cause of action to be brought under federal courts' admiralty jurisdiction). Under these circumstances, we are not compelled to follow *Klaxon*. And we do not.

To answer the choice of law question presented by these cases, we apply a federal choice of law rule. In doing so,

we are mindful that there is "no federal general common law," *O'Melveny & Myers v. F.D.I.C.*, 114 S. Ct. 2048, 2053 (1994) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)). The Warsaw Convention, however, embodies a concrete federal policy of uniformity and certainty, *see Lockerbie I*, 928 F.2d at 1275, which would be undermined by the use of state choice of law rules. Consequently, we are of the view that these cases present precisely the type of situation in which it is appropriate to craft a special federal rule which, in these cases, is a choice of law rule.[2] *See O'Melveny*, 115 S. Ct. at 2055 (creation of a special federal rule limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law").

In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflict of Laws (1969) as a "general source of conflict of law principles." *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987). For wrongful death actions, § 175 of the Restatement (Second) creates a presumption in favor of the law of the place where the injury occurred (known as the *lex loci delicti* rule):

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the more particular issue, some other state has a more significant relationship under the principles stated in

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[2] Nothing in the Supreme Court's recent *Zicherman* opinion suggests that crafting a special federal choice of law rule in these cases is inappropriate. Indeed, the *Zicherman* Court did not have to address this question because of the parties' stipulation that United States law applied. *See Zicherman*, 116 S. Ct. at 635. *Zicherman*'s ruling that the only issue of what damages were recoverable was governed by federal law (DOHSA), *id.* at 636, and federal law exclusively, lends weight to our conclusion that the use of state choice of law rules is not appropriate.

§ 6 to the occurrence and the parties, in which event the local law of the other state will be applied.[3]

While the presumption in these cases would counsel applying the law of the former U.S.S.R., we take judicial notice of the fact that by the time the respective actions involved in this appeal came to trial, the U.S.S.R. had ceased to exist.[4] The U.S.S.R. *qua* the U.S.S.R., therefore, no longer has a judicially cognizable interest in these matters, including for choice of law purposes, and none of the parties argues that any of the successor states to the U.S.S.R. have retained whatever interest the U.S.S.R. otherwise may have had. *See In re Air Crash Disaster Near Saigon, S. Vietnam on Apr. 4, 1975*, 476 F. Supp. 521, 528 (D.D.C. 1979)

We are, as a result, left to decide whether it is the law of the United States or the law of South Korea that governs the outcome of these cases. For our answer, we again turn to the Restatement (Second) of Conflict of Laws, which, in § 6, suggests that we take into account the following factors:

(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

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[3] A state "denotes a territorial unit with a distinct general body of law." Restatement (Second) § 3. Thus, the United States, South Korea, and the former U.S.S.R. are all states.

[4] Trial took place in 1993.

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability, and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

While both the United States and South Korea have legitimate contacts,[5] a proper balance of these factors leads us to conclude that the law of these cases is governed by the internal law of the United States. First, application of United States law supports "ease in the determination and application of the law to be applied." § 6(g). Second, the Supreme Court and our sister circuits have already applied United States law in other cases involving this disaster, *see, e.g., Zicherman*; *Korean Air*, implying that "certainty, predictability, and uniformity of result," would best be served by following their lead. § 6(f). Third, because these actions arise under the Warsaw Convention, neither nation can legitimately claim to offer greater protection of "the basic policies underlying the particular field of law," or "the needs of the interstate and international systems." §§ 6(e), (a). And fourth, "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," weigh heavily in favor of the United States. § 6(c).

These cases involve only compensatory damages, and courts have noted that decedents' home jurisdictions have a legitimate interest in the recovery of compensatory

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[5] On the one hand, South Korea serves as KAL's place of incorporation, KAL's principal place of business, and the place where KAL's crews are trained. *Korean Air*, 932 F.2d at 1498 (Mikva, J., dissenting). On the other, many of the KAL airliner's passengers (including the five decedents in these cases) came from the United States, where the KAL flight began and where all of the tickets were purchased. *Id.*

damages. *See, e.g., In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 644 F.2d 594, 612-613 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) (holding that, in a domestic airline crash involving the states of domicile of the plaintiffs and defendants, the plaintiffs' home states lacked an interest in punitive damages because "[t]he legitimate interests of these states, after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries."); *Korean Air*, 932 F.2d at 1499 (Mikva, J., dissenting). We think that this reasoning, which is normally employed in domestic actions, has significant force in these international actions as well, particularly since it is United States law that has been applied in other actions arising out of this air crash. *See, e.g., Zicherman.*

B.

Having concluded that United States law governs these cases, our inquiry into the availability of loss of society and survivor's grief damages follows the path laid out by the Supreme Court in *Zicherman*. *Zicherman* requires us to apply DOHSA, U.S.C.A. §§ 761 *et seq.* (West 1975), as the internal law of the United States which governs the outcome of the matters *sub judice*. *Id.*, 116 S. Ct. at 636. In *Zicherman*, the Supreme Court held that where DOHSA applies, it is the exclusive source of damages recoverable in the wrongful death claims. *Id.*

Finding that DOHSA permits only pecuniary damages, *Zicherman* held that loss of society damages, not being "pecuniary," could not be recovered under DOHSA. *Id.* at 637. In accordance with that holding, we reverse the district court's award of such damages.

As to the recoverability of survivor's grief damages under DOHSA, we note that the Supreme Court did not directly address this issue. We cannot, however, perceive any distinction of which the *Zicherman* Court would have

approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not. We, therefore, hold that it was reversible error for the district court to permit any damages for survivor's grief. *See id.*

Because we hold that loss of society and survivor's grief awards are not available, we need not consider KAL's alternative argument that only spouses and financially-dependent relatives may recover such awards.

C.

We also reverse the district court's award of damages for the pain and suffering of the decedents. Although such awards have been engrafted onto recovery awards under DOHSA pursuant to several different theories, *see e.g., Solomon v. Warren*, 540 F.2d 777, 792 (5th Cir. 1976) (permitting recovery for decedent's pain and suffering on the theory that state law provides a cause of action for such damages), *cert. dismissed*, 434 U.S. 801 (1977); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 480 (N.D. Cal. 1987) (permitting recovery for decedent's pain and suffering on the theory that general maritime law provides a cause of action for such damages); *In re Air Crash Disaster Near Honolulu, Haw., on Feb. 24, 1989*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992) (permitting recovery for decedent's pain and suffering on the theory that the Warsaw Convention provides a cause of action for such damages), there is no serious doubt that DOHSA itself does not provide for such a form of damages. *Zicherman*, 116 S. Ct. at 636-637. Despite the fact that the *Zicherman* Court was not asked to address the propriety of allowing a pain and suffering award, *see id.* at 636 n.4, we think the principle of *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases. Thus, for the same

reasons we reversed the survivor's grief damages, we now reverse the award of pain and suffering damages.

III.

For the forgoing reasons, we **REVERSE** the order of the district court and **REMAND** for entry of judgment consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 93-2144/2259/2549;
94-1095/1096/1098/1100/1101

Filed October 10, 1996

DAISY E. BICKEL, REPRESENTATIVE FOR EDNA DORIS MILLER, ET AL.,

Plaintiffs-Appellees,

RICHARD A. BOWDEN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ELEANOR BEATRICE YOUNG BISSELL, ET AL.,

Plaintiffs-Appellees/Cross-Appellants,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant-Cross-Appellee.

BEFORE:

MERRITT, BROWN, and BATCHELDER,

Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 93-2144; 93-2259; 93-2549; 94-1095;
94-1096; 94-1098; 94-1100; 94-1101

Filed January 26, 1996

DAISY E. BICKEL; DOROTHY JONES; RICHARD BOWDEN;
WILLIE JAMES; MICHAEL JONES,

Plaintiffs-Appellees,

—v.—

KOREAN AIR LINES COMPANY, LTD.;

Defendant-Appellant Cross-Appellee.

BEFORE:

MERRITT, *Chief Judge*;
BROWN and BATCHELDER; *Circuit Judges.*

ORDER

Upon consideration of the request of the appellant/cross-appellee to file a supplemental brief in light of *Zicherman v. Korean Air Lines.*

It is ORDERED that the motion be, and it hereby is, GRANTED. All parties shall file five (05) copies of a supplemental brief. The brief must be received in the Clerk's Office by February

15, 1996 and shall not exceed ten (10) pages. No extensions to the deadline will be granted.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 93-2144/2206: 93-2259/2341: 93-2549:
94-1095: 94-1096/1098: 94-1100/1101

Filed March 3, 1994

DAISY E. BICKEL, Representative for Edna Doris Miller (93-2206:2341). RICHARD A BOWDEN, Individually and as Personal Representative of the Estate of Eleanor Beatrice Young Bissell, deceased, (94-1098). MICHAEL D. JONES, Personal Representative of the Estate of Margaret Zarif, a/k/a Margaret Jones, (94-1101),

Plaintiffs-Appellees Cross-Appellants,

JAMES L. CHAMBERS; DOROTHY JONES, Estate of Joyce Chambers, WILLIE N. JAMES, Personal Representative of the Estate of Hazel Jeanne James, deceased,

Plaintiffs-Appellees,

—v.—

KOREAN AIR LINES COMPANY, LTD.;
(93-2144:2259:2549; 94-1095:1096:1100)

Defendant-Appellant Cross-Appellee

BOEING COMPANY

Defendant

Pursuant to discussions held under the authority of Rule 18, Rules of the Sixth Circuit, and by agreement of the parties that consolidation of the above causes for purposes of briefing and submission is appropriate.

It is ORDERED that the causes be and they hereby are consolidated for the purposes stated above.

ENTERED PURSUANT TO RULE 8(b),
RULES OF THE SIXTH CIRCUIT.
Leonard Green, Clerk

/s/ LEONARD GREEN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MDL Docket No. 565

Civil Action Nos. 84-75924-BC,
83-73846-DT,
83-75076-DT,
84-74076-DT,
84-74238-DT,
83-73777-DT

January 7, 1993

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

RICHARD A. BOWDEN, DOROTHY JONES, WILLIE N. JAMES, DAISY E. BICKEL, CHARLES E. FONVILLE, and ESTATE OF MARGARET ZARIF (companion cases),

Plaintiff(s),

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant(s).

MEMORANDUM OPINION AND ORDER

This litigation arises from the crash of Korean Air Lines Flight KE 007, bound from New York to Seoul, South Korea, in the sea of Japan on September 1, 1983, after it had been attacked by Soviet aircraft. Plaintiffs here are the personal

representatives of the six Michigan passengers who, among the total of 269 persons aboard, lost their lives. Plaintiffs filed these wrongful death actions in the Eastern District of Michigan, with jury demands, and the cases were transferred by the Panel on Multidistrict Litigation to the United States District Court for the District of Columbia, Chief Judge Aubrey Robinson, for consolidated trial with all others resulting from the crash, on the issue of liability. *In re Korean Air Lines Disaster of September 1, 1983,* MDL Docket No. 565., Nos. 83-2793, *et al.*

Chief Judge Robinson denied defendant's pre-trial motion to strike plaintiff's jury demands. *In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135 (D.D.C. 1988), *modified*, 932 F.2d 1475 (D.C. Cir. 1991) ("*Korean I*"). He tried the consolidated case to a jury, which rendered a verdict for plaintiffs on liability and awarded $50 million in punitive damages for "willful misconduct" as described in the Warsaw Convention, further discussed below.[1] The jury verdict was appealed by defendant on the questions of sufficiency of the evidence for a finding of willful misconduct and the availability of punitive damages. The question of whether the case should have been submitted to a jury at all was not appealed. The Court of Appeals for the District of Columbia vacated the jury award of punitive damages, holding that such damages are not available under the Warsaw Convention, which it found to be the controlling, if not exclusive, law applicable. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991) ("*Korean II*"). It held, however, that the evidence was sufficient to support a finding of willful misconduct. Petitions for writs of certiorari by both sides were denied by the United States Supreme Court on December 2, 1991. *Dooley v. Korean Air Lines Co.*, 112 S. Ct. 616 (1991). As the issues of liability applicable to all cases have

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[1] *Convention for Unification of Certain Rules Relating to International Transportation by Air,* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. Sec. 1502 (hereinafter Warsaw Convention or Convention).

been determined, including that of defendant's willful misconduct, which removes the usual $75,000 limit of damages available to victims of international airline crashes pursuant to Article 25 of the Warsaw Convention, these cases have now been returned by the Panel on Multidistrict Litigation to their original courts for trial on the question of damages.

Defendant has filed a number of related pretrial motions in this court as to the law applicable to the trial which now must be conducted. They include:

1. A motion to strike plaintiffs' jury demand on the issue of damages.

2. A motion for determination that the governing law, the Death on the High Seas Act, 46 U.S.C. Sec. 761 *et seq.* ("DOSHA"), requires that damage awards be limited to the pecuniary losses of the survivors.

3. A motion for partial summary judgment against the claim of passenger Chambers' survivors, who have acknowledged they have no claims for pecuniary loss.

4. A motion for partial summary judgment on plaintiffs' claims of damages for the pre-death pain and suffering of the decedent passengers.

5. A motion to preclude the testimony of two designated experts as to the pre-death suffering of the decedents.

6. A motion to preclude any reference at trial to the prior jury's finding of willfulness.

Although this Circuit has not yet considered many of the vexing questions ably raised here, the thoughtful opinions of the Judges of the Court of Appeals for the District of Columbia in *Korean I*, and of the Second Circuit Court of Appeals in *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 331 (1991), decided a few months prior, have provided substantial guidance to this

court. For the reasons outlined below, each of these motions must be denied, except for the last.

I. MOTION TO STRIKE PLAINTIFFS' JURY DEMAND AS TO DETERMINATION OF DAMAGES.

The court must note at the outset that plaintiffs filed demands for jury trial of these cases with their complaints. After the cases were bifurcated, consolidated, and transferred to the D.C. District by the MDL Panel, Chief Judge Robinson denied defendant's motion to strike the jury demands in the cases, tried the cases to a jury, and defendant did not appeal that decision. *See* Judge Robinson's decision in *Korean I*. The present motion, although characterized as a motion to strike the "demand as to determination of damages", is but a second motion to strike the demands of the original complaints. The forthcoming trial as to damages is not a new action. Therefore, defendant has waived this objection if in fact it is a valid one. The right to jury has been granted and that decision was not appealed.

Also, the right to trial by jury has become the law of this case, by virtue of Judge Robinson's decisions in *Korean I*, as well as in *Korean II*, *cited in In re Korean Air Lines Disaster of September 1, 1983*, 807 F. Supp. 1073, 1079 (S.D.N.Y. 1992) ("*Korean III* "). His decision has subsequently been denoted the law of the case by other transferor district courts in *Yun v. Korean Airlines Co.*, 798 F. Supp. 755 (E.D.N.Y.1992), *Park v. Korean Air Lines, No.* 83 Civ 7900, 1992 WL 331092 (S.D.N.Y.1992), and in *Korean III*, as well. In affirming the jury verdict as to willful misconduct, moreover, the Court of Appeals for the District of Columbia implicitly affirmed Judge Robinson's submission of the case to a jury, although the question had not been raised by defendant. That court wrote, in *Korean II*, 932 F.2d at 1481:

> When "questions [of willful misconduct] depend upon inferences to be drawn from essentially circumstantial evidence . . . [o]ne can hardly imagine a clearer case in which such questions should have been left to the jury."

> *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532, 538 (2d Cir. 1965) (reversing JNOV for plaintiffs in an air crash case), *cert. denied* 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed.2d 472 (1966).

Throughout its careful analysis of the district court's evidentiary rulings, the potential unfair prejudice of presentation of certain matters to the jury, the jury instructions, and in its conclusions that there was sufficient evidence from which a reasonable jury, contrary to defendant's arguments, could find that willful misconduct had occurred, the D.C. Circuit never raised the hint of a doubt that the case was one triable to a jury, as a matter of law. It's affirmation of the jury finding and of the district court's refusal to grant JNOV constitute an affirmation that the governing law had indeed entitled plaintiffs to trial by jury in the first place.

The governing law must nevertheless be examined, and such an examination at the outset is necessary to a decision of any of these motions. In that regard this court is persuaded that the questions raised here are governed by the terms of the Warsaw Convention, *supra*. The Convention is a multilateral treaty which the Congress of the United States ratified in 1934, and which constitutes the supreme law of the land in the matters upon which it touches. To the extent its terms, policies, and purposes conflict or would be defeated by the Death on the High Seas Act of 1920, it supersedes that Act. The Warsaw Convention established the liability of international air carriers for harm to passengers and goods, fixed limitations on that liability and attempted to provide as much uniformity and predictability in procedures and substantive law to which both carriers and their passengers must submit in case of accident, as possible.

The Court of Appeals for the District of Columbia wrote that:

> The central purpose of the Convention is to limit the liability of air carriers. The contracting states in 1929 believed that limitations on liability would promote the

> development of the fledgling commercial air industry by allowing the airlines to predict their exposure to monetary damages and thereby obtain needed capital and adequate insurance coverage. *See Eastern Airlines v. Floyd*, ___ U.S. ___, ___, 111 S.Ct. 1489, 1499-1500, 113 L.Ed.2d 569 (1991) ("*Floyd II*"); *Lockerbie*, 928 F.2d at 1270-71. . . .

Korean II, 932 F.2d at 1484.

Article 17 of the Convention provides that:

> "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. . . ."

Article 24 allows the contracting states to determine the standing and "respective rights" of claimants under Article 17, "subject to the limitations of the Convention"; and Article 25 provides that the limitation of a carrier's liability is lost when the damage sustained by a claimant is due to the carrier's "willful misconduct" as defined by the law of the forum. The Convention had initially limited carrier liability to $8,300 at Article 22(1), but has been superseded by the Montreal Agreement[2] among air carriers which was approved by the U.S. Civil Aeronautics Board in 1966 and lifted the carrier liability limit to $75,000. The carriers also, in the Montreal Agreement, assumed virtual strict liability and waived the due care defenses of Convention Article 20(1). The scheme presented by the Warsaw Convention has been analogized to that of the workers' compensation laws of this country. *Korean II*, 932 F.2d at 1494, *citing* 2A Larson, Workmen's Compensation Law Sec. 65.11, 12-9 (1990).

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[2] *Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol*, CAB Agreement 18900, note following 49 U.S.C. App. Sec. 1502 (approved by CAB Order E-23680, May 13, 1966 (Docket 17325) (1966), 31 Fed. Reg. 7302), and *reprinted in* Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974).

In short, the representatives of passengers need not prove negligence, but are subject to limitation of recovery *unless* a finding of willful misconduct is made, as has been in this case.

The question of the right to jury trial appears to be one of the "respective rights" which Article 24 of the Convention refers to the contracting states. In this country, the question becomes whether federal or state common law governs, and this court is persuaded by the *Lockerbie* analysis that federal law must control. The drafters of the Convention sought to provide the maximum possible uniformity of result possible and contemplated a Convention adopted and enforced by nation-states, among which our federal system was a rarity. The "states" contemplated were nations, and not each of their sub-states, each of which has developed an independent "patchwork" of common law. The *Lockerbie* opinion points to the minority of states, including Michigan, whose damage rules would create an unpredictability of liability contrary to the policy, needs, and intentions of the drafters of the Convention. Accordingly, we will look to the federal common law, although trends among states may be helpful, in determining that common law.

Before proceeding further, the court must note its awareness that, although the *Lockerbie* court held the Warsaw Convention to be the exclusive, preemptive law controlling, *Korean II* held only that the forum state law is preempted only to the extent it may be inconsistent with the compensatory scheme of the Convention. This court agrees that no more need be decided here, as well.

In 1934 in America, the common law, both state and federal, from the time of the English common law, had provided a trial by jury in actions at law for damages. The 7th Amendment guarantees that right. Defendant argues that DOHSA prohibits trial by jury because this court must sit in admiralty. Assuming that DOHSA does so require, however, its application would defeat the goal of uniformity of the Warsaw Convention, as American Warsaw cases of crashes at sea

would be treated differently from identical crashes on land. Moreover, the subsequent Convention supersedes DOHSA, as stated above, so one must look further, considering DOHSA as only one example of the state of American law at the adoption of the Convention. Both the Federal Employers' Liability Act (45 U.S.C. Sec. 51 *et seq.*) and the Jones Act (46 App. U.S.C. Sec. 688 (West Supp. 1992)) contemplate jury trials in negligence, survival, and wrongful death cases for railroad employees and seamen, respectively. Chief Judge Robinson also, in *Korean I*, noted that the Supreme Court had approved the hearing of all claims a seaman might have in both law and admiralty in a single trial to a jury. *See Korean I*, 704 F. Supp. at 1153, *citing Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16 (1963); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Again, in *In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F. Supp. 1261, 1265 (N.D. Calif. 1992), claims under the Warsaw Convention were held triable by a jury. Finally, in *In re Air Crash Disaster in the Ionian Sea*, MDL Docket No. 229, No. ___ Civ ___, 1979 WL 2973 (S.D.N.Y. April 10, 1979), both DOHSA and Warsaw Convention claims were tried to a jury.

The federal common law, in short, does not require that this court strike plaintiffs' demand for jury trial.

II. DEFENDANT'S MOTION FOR A DETERMINATION THAT THE DOHSA LIMITS PLAINTIFFS' DAMAGES TO PECUNIARY LOSSES.

This motion is premised, as was the motion for a non-jury trial, upon the argument that the DOHSA controls the remedy available to plaintiffs here, because of its applicability to aircraft accidents over the high seas. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). That act provides that plaintiffs may recover only their pecuniary losses resulting from passenger deaths.

This court has already held, however, that to the extent the later Warsaw Convention conflicts with this Act, it controls. The Warsaw Convention contains no such limitation, and its

purpose and policy of uniformity of liability worldwide would be thwarted indeed if compensation for American victims falling into the sea were adjudicated with such disparity to those who crashed on land.

In *Air France v. Saks*, 470 U.S. 392 (1985), the Supreme Court instructed the lower courts to seek the intentions of the drafters of the Warsaw Convention by considering that the document was written by Continental Jurists, trained in the civil law, and writing in French. The "dommage survenu", or damage sustained, which they contracted to make compensable, consisted in French civil law of both "dommage materiel", or pecuniary, and "dommage moral", or moral and non pecuniary damage. The D.C. Circuit held that both are compensable, under the Convention. *Korean II*, 932 F.2d at 1487. Although the Convention is silent as to the elements of moral damages, if we are to give it a meaning consistent with the shared intentions of the parties, we must interpret compensation to include nonpecuniary damages. This motion is, therefore, denied.

III. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE CHAMBERS SURVIVORS' CLAIMS, AS THEY HAVE ACKNOWLEDGED HAVING NO PECUNIARY LOSSES.

This motion is denied for the reasons stated in denying the previous motion. The Convention clearly contemplates awards for non-pecuniary damages and supersedes the DOHSA.

IV. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR THE PASSENGERS' PRE-DEATH PAIN AND SUFFERING.

Although it is difficult to ascertain precisely what moral damages may be awarded, one must start by noting that the Supreme Court has held that none are available for mental anguish absent physical injury. *Eastern Airlines v. Floyd*, 111 S. Ct. 1489 (1991). In that case, the passengers sued for

anguish suffered when their flight had narrowly avoided crashing. This case, unfortunately, is vastly different. The evidence apparently has suggested that the 269 persons aboard the plane were alive and conscious for a substantial time (approximately 10 or 11 minutes after it was hit by a missile and before it hit the sea and possibly for a period thereafter). Moreover, warning shots and flares had been fired at it by the Soviets before the final destructive missile. Their conscious suffering during that period, both emotional and physical (due to rapid decompression), which ended in the death they were each anticipating, was likely considerable. This is pain and suffering accompanied by physical injury, and logically, must be permitted by *Floyd*. In *In re Flight Explosion on Trans World Airlines, Inc.*, 778 F. Supp. 625 (E.D.N.Y.1991), *rev'd sub nom on other grounds, Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992), a terrorist attack caused conscious pre-death pain and suffering on the passengers and recovery was permitted as within the terms of "dommage survenu" of the Warsaw Convention. Similarly, *In re Air Crash Disaster Near Honolulu, Hawaii*, permitted recovery for the pre-death pain and suffering of decedents. The motion to deny such damages is denied.

V. DEFENDANT'S MOTION TO PRECLUDE THE TESTIMONY OF EXPERTS EDZY AND FOODY.

This motion is denied, as the expertise of these witnesses, if it is as represented in pleadings, cannot be gainsaid on the issue of pre-death pain and suffering, and that issue is one on which plaintiffs are entitled to present evidence.

VI. MOTION TO PRECLUDE REFERENCE TO THE PRIOR FINDING OF WILLFULNESS.

This motion is granted, in that plaintiffs are precluded from using the term "willful misconduct" to the jury. They must, however, be permitted to explain to the jury the basis upon which we are all here. Moreover, the *facts* which the D.C. Circuit found sufficient to support a verdict of "willful mis-

conduct" should be made a part of that basis. They are highly relevant to the decedents' pre-death pain and suffering as well as to the anguish of their survivors, and need not be *reproved* here. A stipulation as to what plaintiffs may say as to the facts found to have led to this crash in openings as well as closings is ordered submitted to the court by January 15, 1993. If the parties cannot stipulate, each side shall submit its proposal to the court on that date. Plaintiffs, if such is the fact, are entitled to present evidence that defendant's actions may have exacerbated plaintiffs' personal grief and mental anguish at the loss of the passengers, which must of course be grief *resulting in physical damage*. They may not recover from their grief which did *not* result in physical effects, however. *See Floyd*, 111 S. Ct. at 1502. Their moral dommage survenu, to be compensable, must include physical manifestations. To demonstrate a nexus between the accident, the extremity of the grief, and the manifestations claimed, plaintiffs must be permitted to make a showing of the additional shock caused by the conduct of the carrier.

Also, it should be stated here that the court will not permit hedonic damages for the quality of the decedents' lives, had they continued. ("Loss of the quality or enjoyment of life is not a claim that has typically survived the victim in cases other than Civil Rights cases. . . ." *Korean III*, 807 F. Supp. at 1083.) The pecuniary damages available in accordance with the standards enumerated in DOHSA cases will also of course, be provided. The court will not permit recovery of decedents' lost wages, because such would result in a double award to survivors who may claim loss of support, loss of society, lost inheritance, lost services, and love and affection.[3]

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[3] *See Korean III*, 807 F.Supp. at 1087, *citing Korean II*, *Lockerbie*, *In re Air Crash Disaster Near New Orleans, LA*, 789 F.2d 1092 (5th Cir. 1986), *vacated on other grounds*, 490 U.S. 1032 *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983), and *Winbourne v. Eastern Airlines, Inc.*, 758 F.2d 1016 (5th Cir. 1984), *cert. denied*, 474 U.S. 1036 (1985).

Finally, one plaintiff has requested that the court apply Korean law to its case. That motion is denied, for all of the reasons discussed above concerning applicable law. This court, sitting on a case involving injury to American nationals on a flight originating in this country by an airline permitted to operate here, finds that the paramount governmental interest to be served in these proceedings is that of the United States, and will apply federal common law.

SO ORDERED.

/s/ ANNA DIGGS TAYLOR
ANNA DIGGS TAYLOR
United States District Judge

Dated: January 7, 1993

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

(2)

No. 96-796

Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

DAISY E. BICKEL, DOROTHY JONES, RICHARD A. BOWDEN, WILLIE N. JAMES and MICHAEL D. JONES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the Petitioner misstate the grounds for the decision by the United States Court of Appeals for the Sixth Circuit. The Petition for Writ of Certiorari on the issue sought by Petitioner, namely, whether damages for pre-death pain and suffering are legally cognizable, is not ripe for review by this Court, because the Sixth Circuit refused to address that substantive issue, on the grounds of procedural deficiencies in Korean Air Lines' briefing. The questions presented for review to this Court, therefore, are more properly stated as follows:

1. Can this Court pass upon the issue of whether there is a legal right to assert a claim for pre-death pain and suffering under the facts of this case by Writ of Certiorari, when such issue was not passed upon substantively in the lower court?

2. Whether this Court's decision in *Zicherman* v *Korean Air Lines*, 116 S Ct 629 (1996) only addressed wrongful death damages, and did not address the existence of a general maritime law survival action for pre-death pain and suffering, and, if so, whether *Zicherman* did not have the precedential value claimed by Korean Air Lines, leaving the Sixth Circuit free to refuse to address the legal availability of a pre-death pain and suffering claim?

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BRIEF IN OPPOSITION

Respondents are five individuals, representing estates and also appearing individually on their own behalf. Their cases were consolidated, although tried separately, in the Eastern District of Michigan, consolidated by the Sixth Circuit Court of Appeals, and the Petitioner Korean Air Lines' petition for a Writ of Certiorari seeks review of the single opinion which governs all five of their cases.

As such, Respondents Daisy Bickel, Representative for Edna Doris Miller; Dorothy Jones, Representative of the Estate of Joyce Chambers; Richard Bowden, Individually and as Personal Representative of the Estate of Eleanor Beatrice Young Bissell; Willie James, Personal Representative of the Estate of Hazel James; and Michael D. Jones, Personal Representative of the Estate of Margaret Zarif, a/k/a Margaret Jones, respectfully request that this Court deny the Petition of Korean Air Lines for Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit in *Bickel v. Korean Air Lines*, 96 F3d 151 (6th Cir 1996).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.1 and 15.2, the above identified parties present the following Statement of the Case to address the Petitioner's omissions and to supplement the Statement of the Case presented by Petitioner. Respondents agree with Korean Airlines (KAL), however, that the decedents were killed while passengers on board KAL Flight 007 on September 1, 1983.

A. Proceedings in the Multidistrict Litigation

All of the above parties brought complaints asserting causes of action against Korean Air Lines, including a wrongful death cause of action and, as administrators of the estate of each decedent, a survival cause of action for the decedent's pre-death pain and suffering.

Plaintiffs' actions, all arising out of the KAL 007 disaster, were consolidated for multidistrict litigation before the Federal District Court for the District of Columbia (Honorable Aubrey Robinson, Jr.). In 1988, a jury found that KAL committed wilful misconduct and awarded plaintiffs $50,000,000 in punitive damages. The DC Circuit Court of Appeals overturned the punitive damage award, but upheld the finding of wilful misconduct. All cases were returned to the various transferor courts for damage trials.

B. Proceedings in the District Court

The *Bowden, Chambers, James, Bickel* and *Zarif* actions were consolidated before the District Court for the Eastern District of Michigan, Southern Division, Honorable Anna Diggs Taylor. After the consolidation, KAL filed a series of motions with the ultimate purpose of depriving plaintiffs – representatives of any damages for the wrongful deaths of the decedents caused by KAL's established wilful misconduct. KAL filed motions to strike plaintiffs' jury demands; to deny the legal right to damages for the decedents' pre-death terror, conscious pain and suffering; to deny damages for grief; and to deny loss of society

damages entirely or limit that remedy to dependent beneficiaries. On January 7, 1993, the District Court denied KAL's pre-trial motions to strike jury demands, deny damages, and to limit beneficiaries. Memorandum Opinion and Order, reported in *Bowden v. Korean Air Lines Co, Ltd*, 814 F Supp 592 (ED Mich 1993). The District Court further refused to limit wrongful death and survival claims by exclusive reference to the Death on the High Seas Act [DOHSA], 46 USC App § 761 et seq. *Bowden*, 814 F Supp at 597.

Thereafter, all five damage actions proceeded to trial, singly rather than as a consolidated action. Four of the five cases were tried to a jury. The fifth proceeded as a bench trial. The breakdown of the four jury awards, and the bench trial, follows:

1. *Bickel v. KAL*, Case No. 93-2144, 93-2259

On February 26, 1993, in *Bickel v. KAL*, the jury returned a verdict totaling $1,230,000 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain, suffering and fear of impending death of Edna Doris Miller – $100,000

(b) Loss of society, love, affection and companionship by:

i. Daisy Bickel – $250,000

ii. Alice Olson – $20,000

iii. Ruby Hoeksema – $20,000

iv. Bertha Griebe – $20,000

v. Robert Young – $20,000

vi. Donald Bickle – $750,000

(c) Grief manifested in physical injury by Daisy Bickel – $50,000

2. *Chambers v. KAL*

On March 12, 1993, the jury returned a verdict totaling $1,500,000 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Joyce Chambers – $400,000

(b) Loss of society, love, affection and companionship by:

i. Dorothy Jones – $320,000

ii. Jacqueline Chambers – $240,000

iii. James Chambers, Jr. – $180,000

iv. Cornelius Jones – $180,000

v. Gregory Jones – $180,000

3. *Bowden v. KAL*

On May 4, 1993, the jury returned a verdict totaling $2,960,000 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Eleanor Beatrice Young Bissell – $1,350,000

(b) Loss of society, love, affection and companionship by:

i. Lois Bowden – $625,000

ii. Sonja Johnson – $625,000

iii. Kitty Didtenbir – $50,000

iv. Susan Lewsinkas – $50,000

v. David Johnson – $50,000

vi. Michael Johnson – $50,000

vii. Laura Johnson – $50,000

viii. Karen Johnson – $50,000

ix. Eric Bowden – $50,000

x. Bob Young – $10,000

4. *James v. KAL*

On May 13, 1993, the jury returned a verdict totaling $876,199 in favor of plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Hazel Jeanne James – $30,000

(b) Past and future pecuniary loss sustained by Willie James – $23,199

(c) Loss of society, love, affection and companionship by:

i. Willie James – $750,000

ii. Cynthia Hogans – $48,000

iii. Cecil Garrett – $5,000

iv. Curtis Garrett – $5,000

v. Katherine Coney – $15,000

[The pecuniary loss sustained by husband Willie James is not at issue on appeal, and is not part of the mandate that has been stayed by the Sixth Circuit].

5. *Zarif* v *KAL*

On October 2, 1993, the District Court, Honorable Anna Diggs Taylor, sitting as factfinder, awarded a total of $1,500,000 in damages to plaintiff representative, broken down as follows:

(a) Pre-death pain and suffering and fear of impending death of Margaret Zarif – $1,000,000

(b) Past loss of society, love, affection and companionship by Michael D. Jones – $500,000

Korean Air Lines made post-trial motions in every case, asking for judgment notwithstanding the verdict, and remittitur, as well as motions to set aside all non-pecuniary damage awards. In each case, the District Court denied Korean Air Lines' motion.

C. The Sixth Circuit Appeal

Korean Air Lines appealed the five cases to the Sixth Circuit. The cases were ordered consolidated on appeal, by Sixth Circuit order dated March 3, 1994. A briefing schedule was entered by the Sixth Circuit, mandating that each side file a "common issues brief", and that each individual, and Korean Air Lines, also file a brief raising issues pertinent to the individual cases only. This briefing was accomplished. All issues that were to be raised were to be raised in either the common issues briefs or the specific case briefs.

As noted above, Korean Air Lines squarely, and at every opportunity, argued in the District Court that DOHSA controlled, and as such, no recovery could be

allowed for pre-death pain and suffering of the decedent. All of the cases cited in footnote 7, at page 4 of Korean Air Lines brief (which Korean Air Lines argues as precluding the continuation, in the Sixth Circuit, of the argument begun in the District Court) were decided prior to Korean Air Lines making such argument in the District Court. The District Court clearly heard Korean Air Lines' arguments, and rejected them. The issue was thus preserved for appeal to the Sixth Circuit.

However, in the Sixth Circuit, Korean Air Lines made the tactical decision to abandon and waive this argument. As conceded by Korean Air Lines in its petition for certiorari, Korean Air Lines' common issues brief did not raise the issue of the application of DOHSA so as to preclude pre-death pain and suffering awards. In the joint plaintiffs' common issues brief, this was noted at page 37, where the plaintiffs stated "KAL now conspicuously omits any argument that non-pecuniary damages for a decedent's pre-death pain and suffering are unavailable under DOHSA in these Warsaw Convention actions." Korean Air Lines, with an opportunity to respond to plaintiffs' point in its reply brief, instead chose to respond that DOHSA and the Warsaw Convention complimented, rather than conflicted with each other, and specifically argued that DOHSA governs only the wrongful death measure of damages, and did not govern the survival cause of action for pre-death pain and suffering. (KAL Common issues reply brief at 6).

Oral argument was had on January 31, 1995. At that oral argument, which was extended by agreement of the parties and of the court to 45 minutes a side, Korean Air Lines did not argue that pre-death pain and suffering

damages were barred by DOHSA in these cases. The only arguments on these points were challenges to the evidence on which the award of such damages were based, and the amount of the damages awarded.

About a year later, with no decision having yet come out, this court issued its opinion in *Zicherman v. Korean Air Lines*, 116 S Ct 629 (1996). By order dated January 26, 1996, both sides were ordered to file a supplemental brief, on the issue of the effect of *Zicherman* on the consolidated cases in the Sixth Circuit. Korean Air Lines took the opportunity to raise, for the first time in the Sixth Circuit proceedings, the issue of whether the Death on the High Seas Act precludes the recovery of all non-pecuniary damages, including pre-death pain and suffering damages. The consolidated plaintiffs argued that Korean Air Lines had waived the argument, by not raising it sooner, and also argued that *Zicherman* did not preclude the award of pre-death pain and suffering damages – in fact, *Zicherman* had not even considered the issue. *Zicherman*, 636, note 4.

The Sixth Circuit first upheld defendant's argument, and ruled, in a published opinion, that plaintiffs' non-pecuniary damages, including pre-death pain and suffering of the decedents, was barred by the Death on the High Seas Act. *Bickel v. Korean Air Lines*, 83 F3d 127 (6th Cir 1996). In response, plaintiff moved for rehearing, or in the alternative, for rehearing en banc, raising as one of its arguments that Korean Air Lines had waived the issue of the application of DOHSA to preclude pre-death pain and suffering damages by failing to raise it in any of its opening briefs or at oral argument. The Sixth Circuit, in

lieu of granting plaintiff's motion for rehearing, withdrew those sections of the *Bickel* opinion dealing with the applicability of DOHSA to plaintiffs' damages for the decedents' pre-death pain and suffering, and replaced them with an opinion holding that Korean Air Lines had indeed waived the issue by failing to raise it in its opening briefs to the court. *Bickel v. Korean Air Lines*, 96 F3d 151 (6th Cir 1996). The court, relying upon Sixth Circuit precedent, *Priddy v. Edelman*, 883 F2d 438, 446 (6th Cir 1989), ruled that Korean Air Lines was aware of the issue (see footnote 2, noting that Korean Air Lines presented the District Court with the argument it claims was only available after *Zicherman* to the Sixth Circuit) and yet deliberately did not make the argument.

> "Any argument that Korean Air Lines could make based on the fact that DOHSA does not allow non-pecuniary damages was available to it before the court decided *Zicherman*, and therefore KAL could have raised this issue in its opening briefs. . . . Because KAL initially failed to challenge the propriety of awarding damages for pre-death pain and suffering, and because *Zicherman* does not alter the state of law on the availability of such awards, we decline to address this belatedly raised issue." *Id* at 153-54.

Korean Air Lines then moved for rehearing, or in the alternative, rehearing en banc, to the Sixth Circuit, which was denied by Order dated October 10, 1996. Korean Air Lines now seeks certiorari to this Court. For the reasons set out in the following brief, this Honorable Court should not grant certiorari.

REASONS FOR DENYING THE PETITION

I. THE COURT BELOW REFUSED TO ADDRESS THE SUBSTANTIVE ISSUE PRESENTED BY KOREAN AIR LINES, SO IT CANNOT BE RAISED FOR THE FIRST TIME IN THE PETITION FOR WRIT OF CERTIORARI.

At the time of the Korean Air Lines Petition for Writ of Certiorari, two other cases were pending in this court: *Korean Air Lines v. Forman,* No. 96-530 and *Saavedra v. Korean Air Lines,* No. 96-623. Both of these cases had certiorari denied by decision of 12-9-96. Accordingly, this case is now the only one pending in this Court arising out of the KAL 007 disaster. Thus, unless this Court determines, for the first time, that the Sixth Circuit had no right to apply its own internal, procedural law as to when a party waives and/or abandons an issue, it cannot reach the issues raised by Korean Air Lines in its Petition for Writ of Certiorari. Because the Sixth Circuit was correct, and Korean Air Lines had previously made the argument that DOHSA precludes recovery of damages for pre-death pain and suffering in a survival action in the District Court, and then did not raise it, but instead, tactically waived it in its initial briefs and oral argument to the Sixth Circuit, the Sixth Circuit's decision should not be disturbed, and the Korean Air Lines writ should be denied.

Korean Air Lines has at all times been aware of the distinction between wrongful death damages and survival action damages in this litigation. As previously pointed out, it consistently argued in the District Court

that non-pecuniary damages for pain and suffering, specifically including pre-death pain and suffering of the decedent, should not be awardable under DOHSA. On appeal to the Sixth Circuit, it clearly made a tactical decision. It did not address the legal availability of survival action damages in the opening briefs of the appeal. Indeed, responding to plaintiffs' argument that the Warsaw Convention should be read apart from DOHSA, because they were in conflict as to the issue of survival action damages, defendant spent two pages of its common issues reply brief harmonizing the two, specifically citing with approval the cases allowing decedents' pre-death pain and suffering in aviation disasters.

Thus, Korean Air Lines made a tactical decision to withdraw the issue of DOHSA preclusion of pre-death pain and suffering damages, for legal advantages deemed substantial by it. Only after the *Zicherman* decision did Korean Air Lines, having already briefed and orally argued the issue, make a U-turn, and begin arguing that *Zicherman* served to revive the issue it had previously waived and abandoned. The Sixth Circuit, in its final word on the subject, found this argument easy to refute, and did so.

This Court does not normally hear an issue that has not been raised or resolved in the lower court. *Youakim v. Miller*, 425 US 231, 234 (1976); *Lytle v. Household Manufacturing, Inc*, 494 US 545 (1990); *Illinois v. Gates*, 462 US 213, 218-19 (1993) (referring to appeals from state courts), and there is no compelling reason to do so in this case.

The Sixth Circuit's logic cannot be improved upon, and so is therefore included in its entirety:

"KAL argues that we should not apply this rule to the instant appeal, however, contending that after it filed its opening briefs, the Supreme Court's decision in *Zicherman* intervened and changed the law on the availability of pre-death pain and suffering damages. This contention is incorrect. As noted above, *Zicherman* does not address the propriety of the pre-death pain and suffering damages awarded at trial in that case, and that award stands to this day. See *Zicherman*, 116 S Ct at 636, n 4 (noting that KAL did not challenge the validity of the pre-death pain and suffering award in its petition for certiorari).

Moreover, in stating that DOHSA disallows recovery of non-pecuniary loss of society damages, the *Zicherman* court merely followed settled law. The court decided that question almost 20 years ago in *Mobil Oil Corp v. Higginbotham*, 436 US 618, 625 (1975). The *Zicherman* opinion therefore neither added to, nor made any changes in, the law regarding the availability of non-pecuniary damages under DOHSA. Thus, any argument that KAL could make based on the fact that DOHSA does not allow non-pecuniary damages was available to it *before* the court decided *Zicherman*, and therefore KAL could have raised this issue in its opening briefs." *Bickel* at 153-54.

Korean Air Lines made it a point to raise and preserve the issue that DOHSA precluded pre-death pain and suffering awards on behalf of decedents in aviation disasters over water in the District Court. *Bickel* at fn 2. With full opportunity to preserve this issue in the Sixth Circuit, it tactically declined to do so. The Sixth Circuit

was proper in ruling that this tactical decision precluded the last-minute interposition of the argument, and held it properly to be waived. This Court should not permit it a second chance, in a matter of some substantive importance, where there is no substantive analysis of the issue in the court below for this court to consider.

II. *ZICHERMAN* DID NOT ADDRESS THE SURVIVAL CAUSE OF ACTION OR PRE-DEATH PAIN AND SUFFERING DAMAGES TO THE DECEDENT, SO THE COURT BELOW WAS NOT REQUIRED TO APPLY ANY PRECEDENTIAL VALUE TO *ZICHERMAN* ON THIS ISSUE.

Korean Air Lines also argues that the Sixth Circuit's decision is erroneous, based upon this Court's decision in *Zicherman*, and argues that the *Zicherman* rationale should be applied retroactively to pending cases, so as to eliminate the plaintiffs' verdicts for pre-death pain and suffering damages. Korean Air Lines, as pointed out by the Sixth Circuit, does not read *Zicherman* correctly.

In *Zicherman*, this Court held that the Warsaw Convention acts as "nothing more than a pass-through, authorizing [the courts] to apply the [damage] law that would govern in absence of the Warsaw Convention." 116 S Ct at 636. *Zicherman* only addressed the wrongful death cause of action and measure of damages for deaths that occur on the high seas. If one follows the "pass-through" procedure as it relates to a survival action for pre-death pain and suffering of the decedent, a court is to apply the general maritime law regarding survival actions for pre-death pain and suffering, which would sustain the jury's verdict. This Court has several times implied, without

deciding, that there exists a general maritime law survival cause of action for pre-death pain and suffering. See, *Miles v. Apex Marine Corp*, 498 US 19, 34 (1990), (noting that several Courts of Appeal have identified a general maritime survival cause of action for pre-death pain and suffering); *Sea-Land Services Inc v. Gaudet*, 414 US 573, 575-76, note 2 (1974) (noting the distinction between the wrongful death remedies and survival action remedies); *Yamaha Motor Corp v. Calhoun*, 116 S Ct 619, 625, n 7 (1996) (assuming, without deciding, that *Moragne v. State Marine Lines*, 398 US 375 (1970) encompasses a general maritime survival cause of action).

Several lower courts have also specifically found a general maritime law survival cause of action for pre-death pain and suffering, and have further held that such an action is not precluded by the wrongful death action permitted under DOHSA. *Barbe v. Drummond*, 507 F2d 794, 799-800 (1st Cir 1974); *Azzopardi v. Ocean Drilling & Exploration Company*, 742 F2d 890, 893 (5th Cir 1984); *Law v. Sea Drilling Corp*, 523 F2d 793, 794-95 (5th Cir 1975); *Gray v. Lockheed Aeronautical Systems Co*, 880 F Supp 1559, 1569 (ND Ga 1995); *Rye v. United States Steel Mining Co*, 856 F Supp 274, 279 (ED Va 1994); *Chute v. United States*, 466 F Supp 61, 69 (D Mass 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd*, 573 F Supp 1277, 1285 (WD Pa 1983); *Favoloro v. S/S Goldengate*, 687 F Supp 475, 479 (ND Cal 1987). But see, *Saavedra v. Korean Air Lines*, 93 F3d 547, 550-554 (9th Cir 1996), certiorari denied 12-9-96, No. 96-623. Thus, this Court's direction in *Zicherman* that a pass-through occur, would allow the general maritime

law, which permits a survival action remedy, to compliment the DOHSA remedy of wrongful death. Nothing in the *Zicherman* decision contradicts this result.

KAL argues that "*Zicherman* . . . *obligated* the court below to address the question of whether non-pecuniary pre-death pain and suffering damages are recoverable under DOHSA, the applicable domestic law in these cases." (Petition at 13). In this regard, KAL seriously misstates the *Zicherman* holding. The *Zicherman* holding only requires courts to apply DOHSA to wrongful death remedies. In fact, Korean Air Lines itself argued, in the Sixth Circuit, that DOHSA does not preclude the awarding of survival action damages in the form of damages for pre-death pain and suffering under the Warsaw Convention. Because *Zicherman* itself does not address the survival action damages, the Court below was not obligated to accord it precedential effect. Arguably, even if *Zicherman* did establish a precedent, because the defendant waived and abandoned its issue regarding pre-death pain and suffering damages, the Sixth Circuit was within its rights to decline to address this issue in any event.

Furthermore, the decision of the court below is not, as KAL asserts, in direct conflict with the erroneous decision from the Ninth Circuit in *Saavedra, supra*. In *Saavedra*, the Ninth Circuit addressed the substantive issue of the legal availability of the survival cause of action and, improperly ignoring the distinction between survival remedies and wrongful death remedies, held that the damages for pre-death pain and suffering were not recoverable. In part, the Ninth Circuit relied on the withdrawn first opinion of the Sixth Circuit in *Bickel*. The Ninth Circuit's analysis failed to take into account any of the

substantive differences between survival actions, which are passed through the Warsaw Convention by general maritime law, and wrongful death actions, which are passed through the Warsaw Convention by DOHSA. More importantly, however, there is no conflict between the circuits because the Sixth Circuit did not base its decision on substantive grounds. As pointed out in a study of federal circuit court conflicts, Helman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U Pitt L Rev 693 (1995), scholars have debated for more than half a century the question of what is an intercircuit conflict. *Id* at 707. Probably the best answer was set out in Estreicher and Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 NYU L Rev 681, 722 (1984) as follows:

> "A conflict, for present purposes, occurs when two or more courts – take contrary positions on the same legal issue. We term this a 'square' conflict. A conflict presses for Supreme Court review only when courts in a given jurisdiction – federal circuit or state – are bound to follow a legal rule contrary to the rule that must be followed in another jurisdiction. . . . Nor does a square conflict exist when a federal court of appeals or a state supreme court has stated its opposition to another court on a question of federal law dicta or as part of an alternative holding."

Under this definition, there is no conflict between *Saavedra* and *Bickel*. Were the issue to arise again in the Sixth Circuit, the lower federal district court for the Eastern District of Michigan, and indeed, the Sixth Circuit itself, could choose to follow *Saavedra*, or at that point,

could choose, for the first time, to issue a holding squarely conflicting with the issue decided by the Ninth Circuit in *Saavedra*.

However, *Bickel* did not do so. Instead, relying upon Sixth Circuit precedent and sound jurisprudential reasoning, the Sixth Circuit, in the amended *Bickel* decision, ruled that the petitioner herein, by its own statements and actions, had tactically chosen to waive or abandon the issue now sought to be presented to this Honorable Court by writ of certiorari. Therefore, under no circumstances is there a conflict between the Ninth and Sixth Circuits on the issue of whether DOHSA precludes the awarding of pre-death pain and suffering damages in a survival action.

As this Court is aware, the KAL 007 disaster occurred in 1983. The families involved have been through more than 13 years of torturous litigation. The issue of whether a general maritime law survival cause of action for pre-death pain and suffering passes through the Warsaw Convention in the way that *Zicherman* determined that DOHSA wrongful death cause of action does is undeniably an issue of some moment, and may be an issue that eventually will have to be faced by this Court. However, for all the reasons set forth above, this case is not the proper vehicle for such a holding. Even if this Court were to hold that no pre-death pain and suffering damages are available in a Warsaw Convention action, such would not apply to this case, because defendant had voluntarily waived and abandoned the issue in the Sixth Circuit. Nothing in *Zicherman* decides the issue; and Korean Air

Lines is incorrect in stating that by the fortuitous interposition of the *Zicherman* opinion, it revitalizes the claims that it had voluntarily waived in the Sixth Circuit below.

CONCLUSION

For the reasons stated herein, this Honorable Court is respectfully requested to deny the petition.

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No. 96-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

DAISY E. BICKEL, DOROTHY JONES, RICHARD A. BOWDEN, WILLIE N. JAMES and MICHAEL D. JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* ..... *passim*

Petitioner KOREAN AIR LINES CO., LTD. ("KAL") submits this Reply Brief to address the arguments of Respondents and in further support of the Petition for a Writ of Certiorari.

A. KAL Properly Addressed in the Court Below the Availability of Nonpecuniary Pre-Death Pain and Suffering Damages in Light of *Zicherman*

Respondents erroneously state that following the issuance of the Order of the court below directing the parties to file supplemental briefs to address the effect of *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), on the pending appeals, KAL "took the opportunity to raise, for the first time in the Sixth Circuit proceedings," the issue of whether the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761, precludes nonpecuniary pre-death pain and suffering damages in an action governed by the Warsaw Convention.[1] Respondents' Brief in Opposition ("Opp.") at 8. Respondents disregard the fact that the court below directed the parties to file supplemental briefs only after KAL had requested permission to submit a supplemental brief to address the recoverability of nonpecuniary pre-death pain and suffering damages as a matter of law, in light of *Zicherman*. *See* Order (6th Cir. Jan. 26, 1996) (A 31a-32a).[2] As a result, both KAL and Respondents fully addressed, in their respective supplemental briefs, the substantive issue of whether nonpecuniary pre-death pain and suffering damages are recoverable in these cases. Thus, KAL did not improperly raise or address the issue in the supplemental brief. Rather, KAL addressed the issue pursuant to the express direction of the court below.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105).

[2] References preceded by "A" refer to pages in the Appendix to the Petition for a Writ of Certiorari.

B. Under the Warsaw Convention "Compensable Harm Is to be Determined by Domestic Law"[3]

The motivating factor underlying the decision on rehearing of the court below in *Bickel v. Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996) ("*Bickel II*"), was to mitigate the perceived harshness in these cases of applying the pecuniary loss standard of DOHSA. On rehearing, the court below (2-1) invoked the procedural waiver rule, twice previously rejected by the court below, to circumvent the impact of *Zicherman* and avoid the practical but correct result of *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996) ("*Bickel I*").[4] As the dissent in *Bickel II* explained:

> After carefully reviewing the majority's opinion, I have little doubt that the majority and I do not disagree very much about the harshness of the result in this case if DOHSA were to be exclusively applied. *But as a federal judge, and not a federal legislator, I am bound to apply DOHSA, not as may seem "just" to me, but as it is written, and as it has been interpreted by the highest judicial authority in the land.* And there is simply nothing in the language of DOHSA and nothing in *Zicherman* (or any other case to which the majority points) that leads me to believe there is any principled way to avoid the conclusion that there is no basis in the law for the pre-death pain and suffering awards which today's majority upholds. Yet, the majority defaults KAL and holds that it must pay damages that are not available as a matter of law. In doing so, the majority rests its judg-

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[3] *Zicherman*, 116 S. Ct. at 635.

[4] Respondents' rehearing petition in the court below presented the exact same arguments and authority as to waiver as were presented twice previously and rejected by the unanimous Panel in *Bickel I*. The only new "argument" presented by Respondents on rehearing was that the result of the unanimous decision in *Bickel I* was to strike all nonpecuniary damage awards and leave all but one of the plaintiffs with no recoverable damages.

> ment not even on the shifting sands of its understandable desire to do equity in these cases. Rather, the majority constructs this judgment "upstairs above a vacant lot."

Bickel II, 96 F.3d at 158-59 (Batchelder, J. dissenting) (emphasis added and footnote omitted) (A 16a-17a).

Even Respondents *do not* dispute that the decision of the district court allowing nonpecuniary damages for pre-death pain and suffering is incorrect. *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993) (A 41a-44a). This is because the sole legal basis for the district court's award of nonpecuniary pre-death pain and suffering damages was Article 17 of the Warsaw Convention and the Court in *Zicherman* unequivocally rejected the view that any types of damages are recoverable directly under Article 17 of the Convention. *Zicherman*, 116 S. Ct. at 632-635. Nevertheless, Respondents argue that KAL "seriously misstates the *Zicherman* holding" and that the court below was not required to accord *Zicherman* "precedential effect" because *Zicherman* did not directly address survival damages. Opp. at 15.

The Court in *Zicherman* found that the Convention provides "nothing more than a pass-through, authorizing [courts] to apply the law that would govern in the absence of the Warsaw Convention." 116 S. Ct. at 636. The Court's holding is not limited to wrongful death and loss of society damages, as argued by Respondents (Opp. at 15), but applies to the determination of *all* "damages" recoverable in an action governed by the Warsaw Convention.

The question that confronted the court below was whether nonpecuniary pre-death pain and suffering damages are recoverable under "the law that would govern in the absence of the Warsaw Convention." *Zicherman*, 116 S. Ct. at 636. Applying *Zicherman*, the court in *Bickel I* found that (1) the principle of *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages, and (2) because the court could not perceive any distinction that the Supreme Court in

Zicherman would have approved, that would permit recovery of one type of nonpecuniary damage and not another, nonpecuniary damages for pre-death pain and suffering are not recoverable under DOHSA. *Bickel I*, 83 F.3d at 132 (A 26a-28a); *accord Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir.), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996) (No. 96-623); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996).

Despite the clear directive of the Court in *Zicherman* and the fact that both parties, pursuant to the direction of the court below, fully briefed the issue in their respective supplemental briefs, the court below on rehearing (2-1) held that it would not address the argument raised by KAL as a result of *Zicherman*. The court in *Bickel II* held that *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153-54 (A 3a-5a).

Respondents and the court below in *Bickel II* fail to give effect to the full holding of *Zicherman*. As the dissent in *Bickel II* aptly stated:

> [W]e are bound by the principles of *Zicherman*, and I think that there is no getting around the flat, unambiguous holding of *Zicherman* that where DOHSA governs (as it, without question, does here), it governs exclusively; it provides the sole source of damages recoverable; and permits only pecuniary damages. . . .
>
> * * *
>
> *Zicherman*, whatever else may be said of it, clarified the law relative to non-pecuniary damages available under DOHSA.

Bickel II, 96 F.3d at 157-58 (Batchelder, J. dissenting) (A 12a-14a).

For this reason, the decision in *Bickel II* conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir.), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996) (No. 96-623), where the court, in circumstances identical to the cases herein, found that, in light of *Zicherman*, it was "compelled" to hold that nonpecuniary damages for pre-death pain and suffering are not recoverable under DOHSA. *Id.* at 554.

C. KAL Has Never Approved of the Cases Allowing DOHSA to Be Supplemented With Nonpecuniary Pre-Death Pain and Suffering Damages Under General Maritime Law

Contrary to Respondents' argument (Opp. at 11), KAL never has cited cases "with approval" or argued that nonpecuniary damages for pre-death pain and suffering properly are available under general maritime as a supplement to the pecuniary loss remedy of DOHSA. In its reply brief, submitted to the court below, KAL addressed several cases relied upon by Respondents to support the award of nonpecuniary loss of society damages. *See In re Air Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 792 F. Supp. 1541, 1546 (N.D. Cal. 1990) ("*Hawaii I*"); *In re Air Crash Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 783 F. Supp. 1261 (N.D. Cal. 1992) ("*Hawaii II*"); *In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993).[5] KAL stated simply that Respondents ignored that these cases did not address the question whether loss of society damages may

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[5] The court in *Hawaii I* held that nonpecuniary damages for pre-death pain and suffering are *impermissible* where DOHSA applies, but subsequently held in *Hawaii II* that such damages are recoverable on the basis of the Convention alone. The rationale of *Hawaii II* has now been rejected by the Court in *Zicherman*.

be recovered in an action governed by DOHSA and the Warsaw Convention.

D. The Court Below Effectively Passed Upon the Recoverability of Pre-Death Pain and Suffering Damages

Respondents argue that, while the second question presented for review by KAL is "undeniably an issue of some moment", the Court should not review the question in these cases because the court below declined to address the substantive issue of whether nonpecuniary pre-death pain and suffering damages are available under DOHSA following *Zicherman*. Opp. at 17.

Respondents ignore that the court below directly addressed KAL's argument in *Bickel I* and held (3-0) that "the principle of *Zicherman* constitutes an insuperable obstacle to an award of pain and suffering damages—clearly non-pecuniary damages—in these cases." *Bickel I*, 83 F.3d at 132 (A 27a). Unlike the situation in *Forman v. Korean Air Lines*, 84 F.3d 446, 448 (D.C. Cir.), *cert. denied*, 65 U.S.L.W. 3411 (Dec. 9, 1996), where the D.C. Circuit declined to address the argument, stating that it was denied the opportunity to receive "full briefing", the court below found the supplemental briefs adequate and first rendered a decision. *Bickel I*, 83 F.3d at 132.

Even on rehearing, the court below effectively passed upon the issue of the legal recoverability of pre-death pain and suffering damages when it let stand the district court's award of such damages based solely on Article 17 of the Warsaw Convention. *See Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995).

Similarly, by considering the sufficiency of the evidence to support the award of pre-death pain and suffering damages, the court below necessarily passed upon the antecedent question of whether nonpecuniary pre-death pain and suffering damages are recoverable as a matter of law. *See Arcadia,*

Ohio v. Ohio Power Co., 498 U.S. 73, 77 (1990). Thus, the "substantive issue" presented by the second question in the Petition effectively was addressed by the court below.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in all respects.

Dated: December 27, 1996

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